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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 200. No. 201.

HARRY M. BLACKMER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE.

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 200. No. 201.

HARRY M. BLACKMER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE.

I. STATEMENT OF THE CASE.

The appellant, Harry M. Blackmer, a citizen of the United States, was tried in the Supreme Court of the District of Columbia in two cases, No. 16 (No. 5131 in the Court of Appeals and No. 200 in this Court) and No. 18 (No. 5132 in the Court of Appeals and No. 201 in this Court) for contempt in failing to respond to subpoenas issued out of said Court and directed to consuls of the United States in France to be served and which were served personally upon the appellant then residing in Paris. The subpoenas were issued and all proceedings herein were taken under the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C. Sup. IV, Title 28, Sections 711-718), commonly known as the Walsh Act. The cases were tried together before the late Mr.

Justice Siddons and the appellant was found guilty and sentenced to pay a fine of Thirty Thousand Dollars ($30,000.00) and costs in each case, aggregating Sixty Thousand Dollars ($60,000.00) and costs of both cases, to be satisfied out of property of the appellant then in the custody of the court.

Mr. Blackmer appealed to the Court of Appeals of the District of Columbia where the judgments were affirmed with an opinion for the court by Mr. Justice Robb, 49 F. 2d 523. (R. 200, page 88; R. 201, page 84.)

This Court allowed the petition of Mr. Blackmer for writs of certiorari, 52 S. Ct. 19.

We have been notified by counsel for the appellant that the appellant will rely upon the briefs filed in support of his petition for certiorari and will not file a further opening brief for the hearing on the merits. Therefore, when we refer to the briefs of the appellant we will abbreviate the designation of his brief in support of the petition for certiorari as "B" and his reply brief in support of the petition as "RB".

In the Court of Appeals the appellant raised several questions or points that are not included in his specification of errors (B. 19, 21) or in his summary of argument (B. 22, 23). In support of some of the points still insisted upon, the appellant advanced arguments in his brief in the Court of Appeals which are not advanced in his briefs here. We will have to assume that such questions, points and arguments need no reply from us.

To avoid repetition we ask that it be understood that all italicized matter in quotations is for our own emphasis.

A. WALSH ACT OF JULY 3, 1926.

Some of the points of the appellant (Point H (a—e), B. 23) question compliance of the procedure actually followed with the Walsh Act but in the trial court the appellant filed a motion in each case to vacate and set aside the order to show cause and in connection with the motion in case No. 16 (R. 200) filed a brief in which counsel for appellant said at page 4:

> "*The proceedings herein questioned, however, were all taken in exact pursuance of an Act of Congress,* purporting to validate them and enacted for the very purpose of validating such proceedings in this particular case against this particular respondent. *The question thus reduces itself to a consideration of the constitutionality of this legislation.*"

The Walsh Act, the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C. Sup. IV, Tit. 28, Sections 711, 718) is as follows:—

> "(Public No. 483—69th Congress) (S. 1035)—An Act Relating to contempts.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a

subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in Section 57 of the Judicial Code.

"Approved, July 3, 1926."

B. THE PURPOSE OF THE ACT OF JULY 3, 1926.

Under the heading "History of the Act—Its Special Purpose" the appellant excerpts (B. 2) from remarks in the Senate and in the House of Representatives without suggesting a reason for referring to such remarks. Almost every statute is brought to pass by some particular problem or emergency. This was general legislation, notwithstanding the conduct of the appellant and another were primary inducements for the act.

This Court has said in the case of *Ex Parte McCardle*, 7 Wall. 506, (1868), at page 514:

> "We are not at liberty to inquire into the motives of the legislature."

We also cite:

State Board of Tax Com'rs of Indiana v. Jackson, 283 U. S. 527, 537 (1931) (preliminary print);

State of Arizona v. State of California, 283 U. S. 423, 455 (1931) (preliminary print).

The general purpose of an act as distinguished from the particular emergency that led to it may be helpful in the interpretation of a statute, especially in an effort to determine its constitutionality. For the convenience of the Court we will quote from the report of the Chairman of the Committee on the Judiciary of the House of Representatives to the House, (Report 1313, 69th Congress, First Session). It is said at pages 3 to 4 of the report:

> "It is believed that this bill, which is a general law, will be capable of enforcement by transferring the offense from contempt of a foreign court to one against our own court, providing for a lawful service of a subpoena upon the witness by United States consul, who under the amendment to the bill, is clearly authorized to make service. It will be noticed that the amendment leaves the remedy by letters rogatory the

same as it now is under existing law and only provides that in case of a recusancy the service of a subpoena will make the conduct of the witness an offense or a contempt of the order of the United States court, and thus amenable to its jurisdiction. Wherever a court can get jurisdiction of a person or one guilty of contempt, the procedure to punishment is simple. Here, however, the person can not be seized, as there is no treaty provision for the return of witnesses, only for the return of persons accused of crime. There is no way in which the court against whom the contempt is committed could administer punishment unless through the method provided for in the amendment to the bill, namely, by attachment and sequestration of any property of the recusant witness found within our jurisdiction. It is also provided not only that the subpoena shall be served personally upon the witness but also that the order to show cause why he should not be punished for contempt and his property sequestered, likewise, through the consul of the United States, will be served personally upon the recusant witness."

Then turning back in the report (pages 1 to 2) it is said:

"The bill as it passed the Senate was intended to meet this situation in civil cases. It failed, however, to give *the Government* any relief in criminal cases. This led to a conference with Hon. Atlee Pomerene, special counsel for the United States Government appointed by the President, with a view that the bill as it passed the Senate might be amended to include criminal cases. It is really more important that the Government have the benefit of testimony of important witnesses in criminal cases than even it is in civil cases."

The principal amendment to effectuate the purpose was the insertion of Section 2 of the Act as finally adopted.

C. PROCEDURE IN NO. 200.

On May 13, 1925, Harry F. Sinclair and Albert B. Fall were indicted in the Supreme Court of the District of Columbia, case No. 43,324, for conspiracy to defraud the United States in violation of Section 39 of the Criminal Code. Before May 13, 1927, the case had been assigned for trial on October 17, 1927.

On May 13, 1927, counsel representing the government filed their petition signed by them and sworn to by Owen J. Roberts praying for the issuance of subpoenas under the Walsh Act for appellant and another to attend the trial in Washington. The petition represented that the appellant was a citizen of the United States then or lately in France and gave the reasons of counsel for desiring this testimony. Counsel represented in the petition that they "believe and therefore aver that the attendance of" appellant "is vital and important to the United States" because of the facts which "counsel believe and therefore aver" appellant could give which would be material in connection with the establishment of the Sinclair-Fall conspiracy and of overt acts done therein and specified to what particular facts they referred. (R. 200, pages 1-3.)

The Court issued an order granting the subpoenas to be addressed to any consul of the United States in France for service and fixing $500.00 as the amount to be tendered appellant for traveling expenses. (R. 200, page 4.)

The subpoenas were issued in the usual form, from "the President of the United States to H. M. Blackmer" commanding him to attend said court on October 17, 1927, at 10:00 A. M. to testify on behalf of the United States. (R. 200, pages 7, 9.)

George Orr, Consul of the United States at Paris (R. 200, pages 73, 74; R. 201, page 59) served one subpoena personally upon the appellant on May 27, 1927, at his usual

place of residence in Paris, left the original subpoena with him and tendered him $500.00 for traveling expenses, which he refused. (R. 200, pages 8, 9.) On June 7, 1927, a similar subpoena was served by Raymond Davis, Consul of the United States at Paris (R. 200, pages 73, 74; R. 201, page 59) upon appellant personally at Paris by reading the subpoena to him and leaving a duplicate copy with him. He also tendered $500.00 in currency which tender was refused. (R. 201, pages 9, 10.)

The appellant was called as a witness on October 17, 1927, after the trial of said Sinclair-Fall conspiracy case had been commenced and he failed to respond. (R. 200, pages 45, 46.) Counsel representing him appeared for the purpose of explaining to the Court why he was not present and to state that he would not be present. (R. 200, pages 6, 11, 45, 46.)

On November 4, 1927, counsel for the government filed their petition for a rule in contempt, alleging in substance the citizenship of appellant, issuance and service of the subpoenas as aforesaid and the failure of the appellant to appear as a witness as aforesaid. (R. 200, pages 4, 11.) Pursuant thereto on November 16, 1927, the Court issued its order, referring to the petition for a citation in contempt, and directing the appellant to appear on January 6, 1928, to show cause why he should not be adjudged guilty of contempt and be punished accordingly; directed the seizure by the marshal of $100,000.00 of property of appellant; that the marshal forward a copy of the order to a consul for service upon appellant and that the order be published in a designated newspaper of general circulation in the District of Columbia once each week for six (6) consecutive weeks. (R. 200, pages 11, 12.) The $100,000.00 of property was seized by the marshal on November 19, 1927. (R. 200, page 12.) A copy of the order to show cause was delivered to the appellant at Paris on December 5,

1927, by Consul Orr. (R. 200, pages 12, 13.) The order to show cause was published as directed between November 19 and December 24, 1927, both inclusive. (R. 200, pages 14-16.)

On December 31, 1927, counsel for the appellant, appearing specially, moved to vacate the order to show cause on substantially the same grounds asserted in this Court as Points A to G, inclusive. (R. 200, pages 16, 17; B, pages 22, 23.) In support of the motion counsel filed an affidavit by Mr. Blackmer in which he admits his American citizenship. (R. 200, page 19.) After argument the motion was overruled with an opinion by the late Mr. Justice Siddons, March 21, 1928. (R. 200, pages 20-34.)

On September 9, 1929, counsel, appearing specially for the appellant filed an amended plea in his behalf in which detailed admissions or denials of the facts alleged in the petition for the order to show cause are made, including admission of receipt of the subpoena; rejection of the tender of traveling expenses; the attachment of his property and receipt of a copy of the order to show cause as hereinbefore stated. (R. 200, pages 43, 49.)

Trial was had on September 16 and September 17, 1929, the appellant being represented by counsel. (R. 200, page 72.) Mr. Battle testified that he had discussed the constitutionality of the Walsh Act with appellant at Paris "in the summer of 1927, just after these subpoenas had been served on Blackmer:" (R. 200, page 77.) Mr. Blackmer understood or was given to understand the terms and penalties of the Walsh Act. (R. 200, page 81.)

The decree of the trial court entered October 19, 1929, adjudging appellant in contempt directs the fine of $30,000.00 and costs shall be satisfied out of the property theretofore in the custody of the marshal. (R. 200, pages 65, 66.)

D. PROCEDURE IN NO. 201.

The Sinclair-Fall conspiracy case had proceeded until a mistrial was declared (R. 200, pages 50, 75) on November 2, 1927, for the reasons considered by this Court in the case of *Sinclair v. United States*, 279 U. S. 749 (1929). Before January 9, 1928, the case had been re-assigned for trial on April 2, 1928. (R. 201, page 2.)

On January 9, 1928, government counsel petitioned the Court for an order to issue subpoenas for Blackmer and another citizen of the United States then in France, to appear at the trial on April 2, 1928. The petition this time was sworn to by Atlee Pomerene. It was in the same form and substance as the petition for the subpoenas involved in case No. 200, *supra*. (R. 201, pages 1-3.)

On the same day the Court ordered the subpoenas to be issued as prayed for, again fixing $500.00 as the amount to be tendered for traveling expenses. (R. 201, pages 3-4.) The subpoenas that were issued again were in the traditional form aforesaid but in this case we will emphasize the language of the subpoenas in both cases that the witnesses appear on the specific date "and not depart the Court without leave of the Court or District Attorney." (R. 201, page 4.) A subpoena was served by Consul Orr (R. 201, page 59) on February 1, 1928, personally upon the appellant by exhibiting the subpoena to him, reading it and leaving a copy with him at Paris. At the same time $500.00 in currency was tendered to the appellant and the tender was refused by him. (R. 201, page 5.)

Due to the ill health of Mr. Fall a severance in the Sinclair-Fall conspiracy case was ordered on March 22, 1928, with the case to proceed against Mr. Sinclair. To permit the deposition of Mr. Fall to be taken on behalf of Mr. Sinclair the Court continued the case for two (2) days, until April 4th. On April 3rd counsel had not returned

from taking Mr. Fall's deposition. The deposition was lengthy and had not been typed and Good Friday was about to be reached so the Court adjourned the opening of the trial until April 9th. (R. 201, page 63.)

On April 9, 1928, the trial of Mr. Sinclair for criminal conspiracy in said case No. 43,324 commenced and the appellant was called as a witness and did not respond. (R. 201, pages 7, 26, 27.)

On July 6, 1928, counsel for the government presented their petition to the Court for rule to show cause, reciting the facts hereinabove given under this heading, except the reasons for the continuance of the trial from April 2 to April 9, 1928, were omitted. Otherwise in form and substance the petition was the same as in case No. 200. (R. 201, pages 5-8.)

On the same day the Court ordered "upon the motion of the United States" the appellant to appear on October 15, 1928, to show cause why he should not be adjudged in contempt of Court for failing to obey the subpoena served upon him in the said Sinclair-Fall conspiracy case "the circumstances of which are very fully set out in said motion of plaintiff filed herein." Otherwise the order is in form and substance substantially the same as in case No. 200. (R. 201, pages 9-10.) The Court's order not having been executed, an alias order was obtained on December 26, 1928. (R. 201, pages 11-12.)

Pursuant to the alias order to show cause, on January 7, 1929, the marshal levied upon the same property of the appellant then in his custody. (R. 201, pages 12-14.) Publication of the order was made on January 8 to February 12, 1929. (R. 201, pages 12-14.) A copy of the order was served on the appellant personally by Consul Orr at Paris on January 21, 1929. (R. 201, page 14.)

On February 25, 1929, counsel for the appellant, appearing specially, moved to vacate the alias order for the same reasons aforesaid in support of his motion to vacate the order in case No. 200, still relying upon the affidavit of appellant in which he admits his citizenship. (R. 201, pages 15-19.) The motion was overruled. (R. 201, page 21.)

On September 9, 1929, counsel for the appellant filed pleas in his behalf in which the specific allegations of the petition for the order to show cause are admitted or denied, including admission that the subpoena to appear on April 2, 1928, had been personally served upon him at Paris and that he had rejected the tender of $500.00 and that he, when called as a witness on April 9, 1928 "did not respond to said call and did not appear." (R. 201, pages 21, 23, 24, 26, 27.) He also admits receipt of the order to show cause and knowledge that his property had been seized by the marshal. (R. 201, pages 29, 30.)

As aforesaid this case was tried on September 16th and 17th, 1929, together with case No. 200 and the same testimony of Mr. Battle with respect to his consultation with the appellant as to the constitutionality of the Walsh Act given in our foregoing outline of the procedure of case No. 200 appears in the record of this case, No. 201 at pages 70 *et seq.*

The decree adjudging the appellant guilty of contempt, fining him $30,000.00 and costs and directing satisfaction out of the property in the custody of the marshal was entered on October 18, 1929. (R. 201, 49, 50.)

II. THE CONSTITUTIONALITY OF A STATUTE WILL BE PRESUMED.

This is a new type of legislation, so far as the procuring of testimony is concerned, and for the convenience of the Court, in support of our heading, we refer to the authorities given in the opinion of the Court of Appeals. (R. 200, pages 94, 95.)

Mr. Justice Siddons said (R. 5131, page 60):

> "We have before us in this case an unusual piece of legislation, unusual in the sense that, so far as we know, it has no analogous precedent in our legislative history; but that would not make it unconstitutional. It would be a sorry day for us, I think, when new conditions, new problems that occur out of our ever-changing and ever more complicated social order do not require new exercise of powers that we ought to consider, if we can, are within the constitutional competency of that branch of the government that may be undertaking to act in a given case."

Not only "every possible presumption is in favor of the validity of a statute" (*Sinking Fund Cases*, 99 U. S. 700, 718) (1878) and not only should legislative enactments be enforced "as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" (*Atkin v. Kansas*, 191 U. S. 207, 223) (1903) but a statute will be interpreted:

> "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." (*United States v. La Franca*, 282 U. S. 568, 574) (1931).

The court may also want to refer to:

Fletcher v. Peck, 6 Cranch *87, *128 (1810);
Ogden v. Saunders, 12 Wheat. *213, *270 (1827);
Briscoe v. Bank of Kentucky, 8 Pet. 118, 122 (1834);
Railway Co. v. Wellman, 143 U. S. 339, 345 (1892);
Brown v. Walker, 161 U. S. 591, 596 (1896).

III. THE EXTRA-TERRITORIAL SERVICE OF THE SUBPOENAS BY THE CONSULS CREATED AN OBLIGATION TO RESPOND AND DID NOT VIOLATE THE DUE PROCESS GRANTED BY THE FIFTH AMENDMENT. (ANSWERING APPELLANT'S POINT A.)

Appellant's point A is that (a) the United States has no power to authorize the service of a subpoena within another country, and, (b) by a consul of the United States unless conferred by a treaty.

A. ANALYSIS OF THE QUESTION.

In the applications for the issuance of the subpoenas and in the petitions for the orders to show cause the government alleged that the appellant is a citizen of the United States and he admits his citizenship. Although the Walsh Act authorizes the subpoenaing of aliens domiciled in the United States temporarily abroad the validity of such provision need not be considered in this case. The government alleged that the appellant was domiciled in the United States but made no effort to prove the fact and the allegation may be regarded as surplusage.

We understand the appellant concedes that a citizen of the United States owes a duty of allegiance which goes with the citizen even unto the uttermost parts of the world and because of the duty of the citizen the United States has the power and right to recall its absent citizen but that the United States cannot exercise that power and right by conveying notice of the recall through a messenger who will have to walk on foreign soil in order to deliver the notice unless there is a treaty with the countries through which the messenger must pass, and, especially that a consul cannot be the messenger without such treaties. (B. 24-30; RB. 5-25.)

In appellant's reply brief, page 6, it is said:

> "(5) It may be conceded that the act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the act * * * had instead paid more attention to the decisions of this Court a way would have opened."

Although the appellant did not express the way a citizen could be validly recalled from abroad his analysis of this Court's decision in *McDonald v. Mabee,* 243 U. S. 90 (1917), (abstracted *infra*), at page 10 of his reply brief, justifies the inference that appellant considers the power of recall could be validly exercised by serving the notice of recall at the citizen's last place of residence within the United States. If he has in mind the holding of this Court in *Luria v. United States,* 231 U. S. 9, 20, 24 (1913), (abstracted *infra*) then his quoted statement justifies the inference that mere publication within the United States of the recall would be a valid exercise of the power and right. The theory upon which substituted and constructive service of a process or notice is held valid, as appears in the cases to which we will refer, is that the substituted means is reasonably calculated to result in actual notice to the person to whom directed. Therefore, the effect of the concession of appellant is that it is proper and valid for the United States to get notice to the citizen abroad that he has been recalled and that such notice *per se* is not an invasion of foreign sovereignty or of the alleged right of asylum of the citizen in the foreign sovereignty.

If in making the quoted statement appellant had in mind the cases sustaining the validity of service by mail, then the inference is that it is proper for the United States to give notice necessary for due process through the agency of the mail carriers of other sovereigns. The principle of the concession would sustain the validity of service by tele-

phone, providing the United States officer were careful to be upon United States soil when he got the connection with the absent citizen. Or, presumably the Congress could have validly provided for service by radio if there were proof that the absent citizen heard the radio message.

But in no event, says the appellant, can an officer of the United States carry the same information, or let us for the moment call it a command, as the appellant insists, upon foreign soil and deliver it to the absent citizen. Again this is not because of the command or the substance of the message, for admittedly it is proper to bring such command or message to the attention of the absent citizen in the substituted ways we have mentioned. The objection is solely that an officer or messenger of the United States has to use the public streets or public carriers or those holding themselves out to carry people for hire in the foreign country in order to get to the absent citizen. It is not an offense, says the appellant in effect, to the sovereignty of the foreign country or to the asylum of our citizen therein to get the command or notice to our citizen but it must be done through a fiction rather than directly. Appellant's position is that no treaty is necessary for the fiction but a treaty is necessary for the consul to walk peacefully upon the streets of Paris when about to serve the command or notice!

The appellant's admission of a citizen's duty of allegiance and of the power of his sovereign to recall him, necessarily implies whatever "jurisdiction *in personam*" is required. The duty of allegiance as a basis for jurisdiction *in personam* is sound in reason and supported by the great weight of authority. It is indirectly supported by the decisions of this Court hereinafter to be noted. It is a much more fundamental basis for jurisdiction than implied, or even express, consent and implied consent is an established basis for jurisdiction *in personam*. (*Hess v. Pawloski*, 274 U. S. 352, (1927) and *Wuchter v. Pizzutti*,

276 U. S. 13, (1928) both abstracted, *infra*.) It is an inherently necessary basis to make the power of recall effective and the benefits of citizenship complete.

Jurisdiction that is defective under our Constitution for want of proper service of process or notice must be distinguished from lack of jurisdiction of the person, or, we think more properly called, personal relations, of the citizen. After the Walsh Act, the court had jurisdiction of the personal relations, or person, of the appellant to the extent of the Act, but, until notice were given that the court intended to exercise such jurisdiction, the court lacked jurisdiction in the sense of being authorized under the Constitution to proceed against the appellant. When jurisdiction of the personal relations exists and has been acted upon, then the initial process that follows, subpoena or summons, whatever its form even as a "command", is, as in implied consent cases (*Wuchter v. Puzzutti, infra*), in *quasi in rem* proceedings (*Security Savings Bank v. California,* 263 U. S. 282, *infra*), and in contempt cases (*Cooke v. United States,* 267 U. S. 517, *infra*), in essential nature and purpose and function a mere "notice". When it is said that the court "*acquires*" jurisdiction by its process, subpoena or summons, the expression relates to the necessity of notice to comply with "due process", unless there was no jurisdiction of a personal relation, inherently or by consent, or of a *res in custodia legis,* in which case it may be said that jurisdiction is "acquired" by the service of the process.

There can be no question but that the Walsh Act provides for such notice as satisfies the "due process" required by the Fifth Amendment of the Constitution.

Thus the principal questions in this case, as narrowed by the appellant, are whether allegiance was a sufficient basis for the subpoena recalling the appellant and whether international law requires consent by treaty of a foreign

sovereign before a messenger of the United States may peacefully use the public highways and conveyances of the foreign sovereignty. It would seem unnecessary, in view of the appellant's concession for us to refer to the authorities concerning the duty of allegiance by a citizen; the right of his sovereign to recall him; the nature of the temporary allegiance owed by the absent citizen to the sovereign of his place of residence and the extent of the interest of the sovereign in what the sovereign of permanent allegiance does with respect to its citizens but we think that relationship between sovereign and citizen is the basis of the power and right of the sovereign to recall its citizen and that the only interest of the foreign sovereign in its alien resident is to see that no act of the sovereign of allegiance towards its citizen creates a breach of the peace or reflects upon the equality, independence or dignity of the sovereign of residence. Therefore, we will briefly call attention to the authorities upon the extra-territorial rights of a sovereign.

The peaceful personal service upon a citizen in a foreign land by an officer of the United States is not contrary to international law. Even if it were contrary to international law, the courts of the United States would be bound to follow and enforce the Walsh Act as the law of this country, binding upon them, unless the act in itself is contrary to some provision of the Constitution. Since the United States, under the Constitution has jurisdiction to recall a citizen, the manner or procedure laid down by the Congress for accomplishing the recall is the supreme law of the land (Constitution, Article VI), unless, as aforesaid, it violates some prohibition of the Constitution. So far as "due process" is concerned, the Court will merely pass upon the fact as to whether such notice (direct and positive personal notice) and the means of compliance therewith (tender of necessary traveling expenses), comport with natural justice. That such is the case is so clear that it is not debated by the appellant.

B. EVERY CITIZEN OWES THE DUTY OF ALLEGIANCE TO THE UNITED STATES.

Carlisle v. United States, 16 Wall. 147 (1872), opinion by Mr. Justice Field, at page 154:

> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."

Minor v. Happersett, 21 Wall. 162 (1874), opinion by Chief Justice Waite, at pages 165-166:

> "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. *He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection reciprocal obligations.* The one is a compensation for the other; allegiance for protection and protection for allegiance."

Luria v. United States, 231 U. S. 9 (1913), opinion by Mr. Justice Van Devanter, at page 22:

> "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

Miller (an Associate Justice of the Supreme Court of the United States) *on the Constitution of the United States,* at pages 294-295:

> "The citizen owes an allegiance to the United States, and he owes an allegiance to his State. He is bound to obey the laws of his State, and he is bound to refrain from all criminal practices denounced by those laws. * * * He is bound to be governed by the United States in all of his relations with foreign states. * * * It is the business of a lifetime to define the relations of a man to that Government, or his relations to the State in which he belongs; but they all grow out of, and constitute this doctrine of allegiance and protection."

Such a fundamental concept of international law would seem to carry with it the implied and tacit consent of nations that the obligation may be made effective in any inoffensive way and we will show that the inference has been actually recognized.

C. THE UNITED STATES HAS EXTRA-TERRITORIAL JURISDICTION OVER ITS CITIZENS.

1. General Authorities.

Rose v. Himely, 4 Cranch 241 (1808), opinion by Chief Justice Marshall, at page 279:

> "It is conceded, that the legislation of every country is territorial; *that beyond its own territory, it can only affect its own subjects or citizens.*"

The Appollon, 9 Wheat. 362 (1824), opinion by Mr. Justice Story, at page 370:

> "The laws of no nation can justly extend beyond its own territories, *except so far as its own citizens.* They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

See also *The Resolution,* 2 Dallas 1 (1781) *per curiam* opinion, page 4.

Willoughby on the Constitution, at page 247, Section 120:

> "From the viewpoint of international relations, as we have just seen, the law of one State is not permitted by other States to *operate* outside of the territorial limits of the State which promulgates it, and, therefore, though claiming a legal authority over an individual outside of such limits, a State will not be permitted by other States *to exercise it against the consent* of the State within whose limits the individual is situated. But that does not render impossible *the existence of or invalidate* such a claim, for when, if ever, such an individual is apprehended within the territory of the State claiming authority over him he may be held responsible for acts committed while abroad. And also, as still more plainly showing the personal and non-territorial character of allegiance and sovereignty is the principle universally recognized both in municipal and international law, that a citizen of a State is in many cases entitled to the protection of that State while abroad. Thus he does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, nor does he escape from beneath its law or cease to be entitled to its protection."

Section 121, page 248:

> "In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, *and over its own citizens wherever they may be.*"

Moore: International Law Digest, Volume II, pages 255, 256:

> "'Taking up theories classified as non-territorial, we may first notice that which proposes the punishment by the State of its own citizens for acts done abroad.

" 'This theory has been separated into three subdivisions; as follows:

(a) The punishment by the State of all acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law. This proposition makes the penal law of the State a personal statute binding upon its citizens everywhere.

(b) The punishment by the State of all acts of its citizens which may be committed in particular places, and which, if committed within its territory, would constitute violations of its criminal law.

(c) The punishment by the State of particular acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law, and which, by reason of their gravity, or the fact that, as is the case with political crimes, the foreign State may not punish them, it is the duty of the State, not only to mankind, but to itself, to punish.

" 'It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own citizens for such acts and in such manner as it may deem proper.' "

Charles Cheney Hyde: International Law, Volume I, page 424, paragraph 240:

"It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience. The unwillingness of the former to respect and yield to the law of the latter is a matter with which no foreign power has the right to interfere."

In *Columbia Law Review*, Vol. 27, pages 204 to 210 the Walsh Act is discussed and it is said at page 206:

> "While under the territorial organization of modern political society the law of a given country can be enforced only within its territorial limits, this does not mean that the law of that country cannot affect the legal relations of persons outside its limits. Law is not something material which spreads out until it reaches a territorial boundary and then stops."
>
> (Citing *Cook, The Logical and Legal Bases of the Conflict of Laws*, 33 Yale Law Journal 457, 482-484.)
>
> (See also *United States v. Bennett*, 232 U. S., *infra*.)

2. A non-resident citizen may be taxed upon income from property not in the United States.

The United States by the Revenue Act of 1921, Section 210 (42 Stat. 227, 233) taxes non-resident citizens upon their income from sources not even in the territorial domain of the United States and this Court holds such taxation a constitutional exercise of sovereign jurisdiction.

Cook v. Tait, 265 U. S. 47 (1924).

Cook sued Tait, a Collector of Internal Revenue, to recover $298.34 of an income tax paid under duress. Cook was a native citizen of the United States, domiciled in Mexico. Upon demand, but under protest, he made a return of his income from property situated in Mexico. Judgment dismissing the action on demurrer was affirmed. The contention made was, (Opinion, page 54):

> "Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the ter-

ritorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases."

In neither the cases cited in *Cook v. Tait*, nor in that case, do the opinions elaborate the extraterritorial jurisdiction of the United States over its citizens, but in the opinion of Mr. Justice McKenna, to which there was no dissent, the holding is unambiguous. At page 56 of the opinion:

"The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in 'mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relations to it.' And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it 'belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.' *In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete.* Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in

or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. *The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.*"

Dealing with a similar subject matter this Court held in *United States v. Bennett*, 232 U. S. 299 (1914), that property of a citizen kept outside of the territorial limits of the United States was taxable by the United States for the reason that no imaginary barrier shuts the government off from exercising the powers which inherently belong to it by virtue of its sovereignty.

In these cases the law itself is the command which operates upon the citizen even though in a foreign land. He requires no notice of the command other than the constructive notice with which he is chargeable. The situation in the case at bar is different only because the application of the law is made to depend upon an extraneous event, the happening of which due process requires be brought to the attention of the citizen.

3. Citizens are punishable in the United States for offences committed in foreign countries.

Citizens are punishable in the United States for violation of the laws of the United States provided they were intended to have extra-territorial effect for the reason that such laws are a command to the citizen not to do the forbidden act. This command is taken with the citizen wherever he goes. He does not violate international law in taking the command with himself. No more is the command of the court, pursuant to authority from Congress, made in the United States, an "offense to the dignity or

right of sovereignty of" the foreign sovereign. (*Bowman* case immediately *infra.*)

United States v. Bowman, 260 U. S. 94 (1922).

The defendant in error was indicted under Section 35 of the Criminal Code for a conspiracy to defraud the United States Shipping Board, Emergency Fleet Corporation, in which the United States was a stockholder. The defendant in error and his associates conspired on the high seas for the delivery at Rio de Janeiro by the Standard Oil Company of 600 tons of oil and to charge the Fleet Corporation for 1,000 tons, and then to divide the money paid for the undelivered 400 tons among the defendant in error and his associates. Upon arrival at Rio de Janeiro 600 tons of oil was actually delivered but payment was collected from the Fleet Corporation for 1,000 tons of oil. A demurrer to the indictment was filed upon the ground of lack of jurisdiction because the crime was committed on the high seas or within the jurisdiction of Brazil. The demurrer was sustained and the indictment was quashed. In reversing the judgment of the District Court with directions to overrule the demurrer and for further proceedings, Mr. Chief Justice Taft discussed the extraterritorial jurisdiction of the United States as follows (pp. 98-100):

> "But the same rule of interpretation should not be applied to criminal statutes which are, as a class, *not logically dependent on their locality for the Government's jurisdiction,* but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. *Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large im-*

munity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title 'Offenses against the operations of the Government.' Section 70 of that chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the locus of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Sec. 72 of c. 4. It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of c. 4 punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there. So, too, Sec. 38 of c. 4 punishes the wilfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not

have meant to confine it to the land of the United States. Again, in Sec. 36 of c. 4, it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section." * * *

Page 102:

"* * * We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section."

* * * * *

"* * * The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. *Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.* * * *"

If then the Congress of the United States can make an act committed by an American citizen in a foreign country, or on the high sea, criminal, as pointed out by the learned Chief Justice Taft in *United States v. Bowman, supra,* and if having committed this offense a United States citizen can be brought to trial in the federal courts within the bounds of the United States, as he likewise points out, it is hard to conceive any sound reason why a witness, who

is a citizen of the United States residing abroad, served with a subpoena, issued by the court under the authority of the Congress can refuse to obey its commands without being in contempt.

If we limit the jurisdiction of our courts in contempt proceedings, to those who are served with process within the United States and make no provision to compel attendance of those beyond the bounds of the United States, to borrow a thought from Chief Justice Taft in the case just cited, we make immune contempts of court which are as easily committed beyond as within the bounds of the United States.

The appellant's attempt to show inapplicability of the *Bowman* case (RB. 22-23) only serves to emphasize its applicability. He argues that in the *Bowman* case punishment was in the United States and that inferentially, it holds that—

> "No officer can put his foot on foreign soil to arrest the offender without the consent of the foreign nation, * * *."

The Walsh Act nowhere contemplates invasion of foreign soil to arrest the witness. This discloses the fundamental error in the reasoning of the appellant. He confuses the extra-territorial jurisdiction of a sovereign over its citizens while abroad with the extent of the power to enforce such jurisdiction. The jurisdiction is complete but it should not be exercised extra-territorially in any way that offends the dignity or independence of the nation where the citizen is found.

D. THE UNITED STATES HAS THE RIGHT TO RECALL ITS CITIZENS FROM ABROAD.

1. Independent Nations Generally Have the Right to Recall Their Citizens.

It follows from the obligation and duty of allegiance of a citizen to his country and from the extra-territorial power to legislate with respect to the relations of nationals to their sovereign, that citizens may be recalled from abroad.

The power was exercised by England as recorded in cases as early as the sixteenth century. (*Bartue and Duchess of Suffolk* (1559) 2 Dyer's Reports 176-b, 73 Eng. Rep. full reprint 388; *Knowles v. Luce* (1579) Moore 109, 72 Eng. Rep. full reprint 473, both abstracted *infra*.)

Vattel, "The Law of Nations," 1853 Edition, page 105:

> "In a time of peace and tranquility, when the country has no actual need of all her children, the very welfare of the State, and that of the citizens, requires that every individual be at liberty to travel on business, *provided that he be always ready to return, whenever the public interest recalls him.* It is not presumed that any man has bound himself to the society of which he is a member, by an engagement never to leave the country when the interest of his affairs requires it, and *when he can absent himself without injury to his country.*"

Again at page 172, *Vattel* states:

> "In virtue of this submission, foreigners who commit faults are to be punished according to the laws of the country. The object of punishment is to cause the laws to be respected, and to maintain order and safety."

Page 173:

> "From a sense of gratitude for the protection granted to him, and the other advantages he enjoys, the

foreigner ought not to content himself with barely respecting the laws of the country; he ought to assist it upon occasion, and contribute to its defense, as far as is consistent with his duty as a citizen of another state. * * *"

"He cannot, indeed, be subject to those burdens that have only a relation to the quality of citizens; but he ought to bear his share of all others."

Page 174:

"The citizen or the subject of a state who absents himself for a time without any intention to abandon the society of which he is a member, does not lose his privilege by his absence; he preserves his rights, *and remains bound by the same obligations.* * * *"

"The state, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject. The foreigner cannot pretend to enjoy the liberty of living in the country without respecting the laws; if he violates them, he is punishable as a disturber of the public peace, and guilty of a crime against the society in which he lives; but he is not obliged to submit, like the subjects, to all the commands of the sovereign. * * *"

The power and right of a nation to recall its nationals for military service is ancient and well recognized. In *Hyde on International Law,* Vol. 1, it is said at page 668:

"For the failure to respond to a call to arms after emigration or prior to naturalization, the sovereign may, not unreasonably, penalize its disobedient nonresident national by depriving him, should its law so provide, of civil or other rights or of property within its control."

The refusal to return to give testimony may result in greater disaster to a nation than failure to return to bear arms. Comparatively few citizens are abroad at any one

time. Their loss to an army may be inconsequential. They may be easily replaced by others. But vast interests of a nation may turn upon the testimony of a single individual. If that individual owes a duty to give his testimony to his country, he should not question his recall. He should not be permitted to cross an imaginary or physical boundary line and scoff at his government in need. What right has he to expect his country, so treated, to protect him abroad, or to protect his property at home?

It is said in *Blair v. United States*, 250 U. S. 273 (1919) at page 281:

> "The giving of testimony and the attendance upon court or grand jury in order to testify, are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned."

2. The United States is Not Less Favored by Reason of Its Constitution Than Other Nations in Respect to the Right to Recall Citizens.

The Constitution, Article I, Section 8, authorizes the Congress "to regulate commerce with foreign nations, * * *." Travel of citizens abroad is a form of commerce with foreign nations. The same section authorizes the Congress "to constitute tribunals inferior to the Supreme Court"; "to raise and support armies, * * *"; "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The Fourteenth Amendment provides in Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *"

Section 5 of said amendment provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

There is no prohibition in the Constitution of the right of the Congress to provide by law for the recall of citizens from abroad when considered necessary.

In *Everard's Breweries v. Day*, 265 U. S. 545 (1924), it is said in the opinion of this Court, pages 558-559:

> "The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, Sec. 8, Cl. 18. In the exercise of such non-enumerated, or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *United States v. Fisher*, 2 Cranch, 358, 395; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch v. Maryland, supra*, pp. 421, 422; *Ex parte Curtis*, 106 U. S. 371, 372; *Legal Tender Case* 110 U. S. 421, 440; *In re Rapier*, 143 U. S. 110, 134; *Logan v. United States*, 144 U. S. 263, 283; *Fong Yue Ting v. United States*, 149 U. S. 698, 712; *Lottery Case, supra*, p. 355; *Hoke v. United States*, 227 U. S. 308, 323."

In *McGrain v. Daugherty*, 273 U. S. 135 (1927), the 8th paragraph of the syllabus is:

> "The two houses of Congress in their separate relations have not only such powers as are expressly granted them by the Constitution, but also such auxiliary powers as are necessary and appropriate to make the express powers effective, but neither is invested with 'general' power to inquire into private affairs and compel disclosures."

The recall of a citizen to bear arms is appropriate for carrying into execution the power of the Congress to raise and support armies. Likewise, the recall of a citizen for the purpose of giving testimony in a case pending in court, is appropriate to the power of the Congress to constitute tribunals inferior to the Supreme Court. The recall of a citizen is appropriate to the carrying into execution of the ancient common law duties of citizens and the regulation of commerce with foreign nations.

The power to recall citizens was recognized by the framers of our Constitution as inhering in the legislative branch of our government. Mr. Justice McReynolds gives that history in his dissenting opinion in *Myers, Administratrix, v. United States,* 272 U. S. 52 (1926) at page 235 as follows:

> "Perhaps, the best statement concerning 'executive power' known in 1787 was by Mr. Jefferson in his Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (Writings, Ford's ed. 1894, vol. 3, 155-156):
>
> 'The executive powers shall be exercised by a Governor, who shall be chosen by joint ballot of both Houses of Assembly * * *. By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary. The application of this idea must be left to reason. We do, however, expressly deny him the prerogative powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, lighthouses, and sea marks; of laying embargoes, of establishing precedence, of retaining within the State, or *recalling to it any citizen thereof,* and of making denizens, *except*

so far as he may be authorized from time to time by the legislature to exercise any of those powers.'

"This document was referred to by Mr. Madison in the Federalist, No. XLVIII."

3. Congress Can Delegate to the Judiciary the Power of Recall of Absent Citizens Wanted as Witnesses.

The appellant claims, although not dignifying the claim as a separate point, the exercise of the right of recall is an executive or legislative function and that hence Congress could not confer it upon the federal judiciary. (B. 29.) *Myers, Administratrix v. United States,* 272 U. S. 52 (1926), is cited. The only specific reference in the case to the right of recalling citizens which we can find is in the dissenting opinion of Mr. Justice McReynolds, from which we have quoted *supra.* The statement there is that the legislature shall have the power of recalling the citizens and may delegate it to the executive. If the power is in the legislature we perceive no reason why it may not delegate the power to the judiciary, as well as to the executive, for purposes appropriate to the administration of justice.

The appellant also cites *Federal Radio Com. v. General Electric Co.,* 281 U. S. 464 (1930). (B. 29.) This case merely holds the review by the Court of Appeals of the District of Columbia under the Radio Act of 1927 (c. 169, 44 Stat., pt. 2, 1162) as amended in 1928 (c. 263, 45 Stat. 373) and in 1929 (c. 701, 45 Stat. 1559), is an administrative and non-judicial review from which there is no appeal to the Supreme Court since it is a constitutional court and cannot be invested with non-judicial functions.

The power to subpoena witnesses for cases pending in court, is, of course, judicial (40 *Cyc.,* p. 2155, par. A), though the court may use the executive arm of the government for ministerial acts involved in serving the sub-

poena and carrying out its orders. The power of subpoenaing witnesses is no less judicial in nature when it recalls the witness from abroad. Under such circumstances the function is not so foreign to judicial functions but that it may be made to reside in the judiciary. Furthermore, the order of recall is the combined act of the legislative, judicial and executive arms of our sovereignty. The Walsh Act gives the authority of the legislative branch. The petition for the allowance of the subpoenas is an act of officers in the executive branch of our government. The order of the court allowing the subpoenas is the approval of the judicial branch. The subpoena is served through the executive branch and is in form and substance a notice of the command of the President as well as of the court. How, then, can it be properly said that the recall is by the judiciary?

Making the recall depend in part upon action of the judiciary does not render the statute an invalid delegation of legislative power.

In *Field v. Clark,* 143 U. S. 649, at 694 (1892), this Court quotes with approval from *Locke's Appeal,* 72 Pa. St. 491, 498 (1873), as follows:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government."

Bakelite Corporation, Ex Parte, 279 U. S. 438 (1929).

This case was decided upon a petition for a writ of prohibition to the Court of Custom Appeals prohibiting it from entering an appeal from findings of the tariff commission. Prohibition was denied. It is said in the opinion, page 451:

"Legislative courts also may be created as special tribunals to examine and determine various matters arising between the government and others which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."

We also cite: *Chapman, In re,* 166 U. S. 661 (1897).

So also the question as to whether a witness should be subpoenaed, even though involving recall from abroad, when it pertains to a case pending in court, is peculiarly a judicial question which is naturally within the judicial function that can be deputed by Congress. It would be contrary to common sense to require a special act of the Congress every time a citizen is desired from abroad to be a witness in a case pending in court.

4. The Duty of Allegiance is a Sufficient Basis for Jurisdiction In Personam.

We do not claim the United States has the right to invade by force the territory of another sovereign against its will and to take a citizen into custody and forcibly return him to this country, but we claim the United States has the right to create an obligation of citizens abroad to return, to enforce the obligation by an exercise of power within the territorial domain of the United States, provided the citizen has had the notice essential to due process.

In so far as power is essential to jurisdiction, the requirement is met by (1) power to withdraw protection of the citizen, (2) power to compel expatriation, (3) power to take the citizen into custody should he ever be found within the territories of the United States, and (4) power to take possession of his property within the territories of the United States. None of these powers depend in any

sense upon the consent, express or implied, of the sovereign of residence, nor do any of them in any way interfere with the independence, equality, peace or dignity of the sovereign of residence.

The relationship of sovereign and citizen is a status known as citizenship (Webster's New International Dictionary "Citizenship"). It may be something analogous to the marital status as far as jurisdictional consequences are concerned. (*Luria v. United States*, 231 U. S. 9 (1913); *United States v. Knight*, 291 F. 129, 131 (1923), affirmed 9th C. C. A., 299 F. 571; *Thompson v. Thompson*, 226 U. S. 551, 562 (1913)).

The American Law Institute has issued what it calls "Proposed Final Draft No. 1 on the Law of Conflict of Laws" with Professor Joseph H. Beale of Harvard Law School as the reporter and eleven eminent members of the bar as advisors, from which we quote as follows:

> "Section 80. A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard."
>
> "Section 82. The exercise of jurisdiction by a state through its courts over an individual may be based upon any one of the following facts:
>
> (a) He is personally present within the state;
>
> (b) He has his domicile within the state;
>
> (c) He is a citizen or subject owing allegiance to the state;
>
> (d) He has consented to the exercise of jurisdiction;
>
> (e) He has by acts done or events caused by him within the state subjected himself to the jurisdiction."
>
> "Section 85. A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state

COMMENTS:

a. A state has jurisdiction over a person domiciled in the state and can exercise jurisdiction over him through its courts by rendering a judgment imposing a personal liability upon him. Such a judgment is valid in the state in which it is rendered and will be recognized by other states as valid."

"Section 86. A state which in the law of nations has standing as a nation can exercise through its courts jurisdiction over its nationals, although they are not present or domiciled within the state." —— See also Sections 43, 48, 49.

In 27 *Harvard Law Review*, at pages 464 to 466, there is comment upon the case of *Grubel v. Naussauer*, 210 N. Y. 149 (1913), one of the cases cited by the appellant, which will be noted later herein, in which the editors say:

"It is to be regretted also that the court takes the view that foreign judgments are enforced solely by virtue of comity. * * * Granting jurisdiction the judgment raises a right in the plaintiff and a correlative duty in the defendant. * * * The duty of obedience to the court's command is the common-law basis for jurisdiction *in personam*. * * * It would seem also that the duties arising out of citizenship ought to be enough to confer personal jurisdiction. Obedience to the sovereign is the first principle of all law."

The decision of the trial court in the case at bar received the following comment in 41 *Harvard Law Review* at page 1067:

"The allegiance owed by a citizen to his state has frequently been declared sufficient to give personal jurisdiction over a citizen abroad. * * * Moreover, the reasonable notice required by the statute satisfies the constitutional guaranty of due process. Granting this, no difficulty is found with satisfying the contempt judgment out of the recusant witness' property situ-

ated within the country, since this procedure is paralleled by the familiar process for the attachment of the property of a non-resident defendant by an action *quasi in rem.*"

The *Michigan Law Review*, Vol. 30, pages 137 to 142, reviews the decision of the Court of Appeals in the case at bar and concurs with the opinion of that court in every respect. The same is true of the editorial in *The American Journal of International Law* by Professor Edwin D. Dickinson, of the University of Michigan Law School. (Said journal, October, 1931, Vol. 25, No. 4, pp. 723, *et seq.*)

Dicey, Conflict of Laws, 4th ed., 396;
Goodrich, Conflict of Laws, 137, 139;
Story, Conflict of Laws, 8th ed., 754;
Wharton, Conflict of Laws, Sec. 649, n. 3;
2 *Moore, International Law Digest*, 243;
1 *Oppenheim, International Law*, 3rd ed., 338;
1 *Wheaton, International Law*, 6th ed., 269, 272;
Foote, Private International Law, 3rd ed., 551, 552;
Nelson, Private International Law, 360;
Westlake, Private International Law, 5th ed., 25 *et seq.*;
1 *Piggott, Foreign Judgments and Jurisdiction*, 248 *et seq.*;
6 *Halsbury's Laws of England*, 284;
50 *L. R. A.*, note, 577, 586;
Glover v. Glover, 18 Ala. 367 (1850);
Hamill v. Talbott, 72 Mo. App. 22 (1897);
Hunt v. Hunt, 72 N. Y. 217 (1878);
Frothingham v. Barnes, 9 R. I. 474 (1870);
Ouseley v. Lehigh Valley Trust & Safe Deposit Co., 84 F. 602 (1897).

We reserve for citation under subsequent headings in the development of our answer to appellant's point "A",

many decisions perhaps even more persuasively supporting jurisdiction *in personam* based upon the duty of allegiance owed by a citizen to his country. For instance, such cases as—*Bartue and Duchess of Suffolk; Knowles v. Luce; Schibsby v. Westenholz; Douglas v. Forrest* (English cases), and *Luria v. United States; Mabee v. McDonald; McDonald v. Mabee; In Re: Hendrickson; Langdon v. Doud; Henderson v. Staniford* (American cases, including decisions of this Court).

E. THE NOTICE OF RECALL NECESSARY TO DUE PROCESS AS A PREREQUISITE TO PUNISHMENT FOR DISOBEDIENCE MAY BE SERVED ABROAD.

1. General Statement.

We have shown that the action of the court in ordering the issuance of a subpoena for a citizen abroad creates an obligation and duty of the citizen to return. We recognize that the citizen could not be punished in accordance with due process or natural justice for failing to fulfill his obligation and duty if he received no notice of the order and was therefore unaware of the happening of the condition which transformed his potential obligation and duty into an actual duty. In view of the concessions of the appellant as hereinbefore analyzed this question is reduced to the right of the United States to give such notice through a messenger instead of through a fiction.

In answering the question, cases sustaining the sufficiency of extra-territorial service of notice in actions *in rem* and *quasi in rem* are just as helpful as in cases *in personam* and cases in contempt. If there were no right under international law to serve a notice personally upon a citizen in another sovereignty then whatever effect is required of such notice is just as invalid fulfillment of the purpose in one case as in another.

2. England Has Exercised the Right to Send Messengers to Give Notice of Recall to Absent Subjects.

In 1559 The Exchequer decided the case of *Bartue and Duchess of Suffolk* (2 Dyer's Reports 176b; 73 Eng. Rep., full reprint, 388). Queen Mary had given Bartue permission to go to Germany to collect debts due the estate of the Duke of Suffolk. The Duchess of Suffolk followed without license. In truth both left for religious reasons. The Queen sent a messenger with summons under seal commanding their return, but their servants attacked the messenger and forced his return without service of the summons. The messenger reported to chancery and chancery issued *mittimus* to exchequer. Exchequer issued a commission to a gentleman in Lincoln County reciting the contempt and directed seizure of all real, personal and mixed property of the fugitives and return of rents into the exchequer. This was done until 1558 when the fugitives filed a traverse in the exchequer to the charge of contempt alleging they did not adhere to enemies of England and that the purpose for getting the license had not been completed. The Judges held the fugitives guilty of contempt.

In 1579 the Exchequer division of Court of Common Pleas decided *Knowles v. Luce* (Moore 109; 72 English Reports, Full Reprint, 473). Knowles brought ejectment against Luce involving a copyhold. The title turned on the validity of seizure under order of the Queen. The property had belonged to Englefield who was given a license to go abroad. Subsequently the Queen sent a messenger with summons for his return which was delivered but not obeyed. Thereupon the Queen issued a warrant reciting the contempt and directing commissioners to seize his property. This manor was one piece of property seized. The income was paid to the Queen. The procedure was repeated in 1570 under a statute that year passed. Finding was for Knowles and it was said in the opinion (p. 474):

"The reason for the judgment as it was delivered by Manwood, Chief Barron, was such (that is) that the thirteenth and fourteenth statutes of Elizabeth were made in accordance with the common law, and did not give the Queen any new right, but only explained what she had before; *for by ancient prerogative, the Queen had a natural interest in the person of each subject, to serve her in such capacity as she should appoint;* and for this the common law gives the principle of *'non exeas Regnum'* (Do not leave the Country) before the subject goes outside of the Realm, *and when he is overseas, the common law gives the Queen liberty to recall him, and if he does not wish to return then the Queen can seize his lands until he returns, and use the profits in the maintenance of others to do the service that he would do her if he were in the Realm;* and also to restrain him from the ability and power of continuing in his disobedience; and with respect to this he cites two precedents in the Exchequer, viz. the case of Mortymer in the reign of Edward II and the case of Bartue in the reign of Queen Mary."

3. Notice May be Personally Served Extra-Territorially in Actions in Rem and Quasi in Rem.

Many of the states of the United States have statutes providing that in actions *in rem* and *quasi in rem,* as in so-called foreign attachment cases, among other methods of giving notice, the notice may be mailed or personally served, even outside of the territorial limits of the state. (50 *Corpus Juris,* p. 542, §213, p. 543, §215.) Under such statutes, the giving of personal notice abroad has never been condemned as an invasion of foreign sovereignty.

Perez v. Fernandez, 220 U. S. 224 (1911).

In this case Fernandez recovered a judgment against Perez and another setting aside certain mortgages and judicial sales of property in Porto Rico, as fraudulent and simulated. Perez was a resident and a citizen of Spain.

Section 57 of Judicial Code provided that the absent defendant should be served, *"if practicable wherever found."* The marshal made a return that he could not be found for personal service. Publication was resorted to and a default judgment was obtained. Within a year Perez appeared to set aside the judgment but the trial court made a condition of granting the request that Perez prove that he had received no actual notice of the pendency of the action in which Fernandez had recovered judgment. Perez was unable to make such proof and the trial court refused to set aside Fernandez's judgment. This Court reversed the decision but said in the opinion (pages 230-231):

> "After thus giving authority to the court to authorize the actual personal service of a notice outside of the district, the statute then, in cases where such *personal notice is impossible,* provides for publication * * *, * * *. In other words, where the property is situated in the district where the suit is brought as provided in the statute the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication calling upon the party to appear and defend within the statutory time, this latter notice, however, being only necessary where the former method cannot be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense."

See also *Mellen v. Moline Malleable Iron Works,* 131 U. S. 352 (1889).

The wide range of states recognizing the right to go upon foreign soil to give such notice is indicated by the following citations:

Thompson v. Thompson, 35 App. D. C. 14, Aff'd. 226 U. S. 551, 564 (1913);
Simonson v. Typer, 285 F. 240 (C. C. A. 8) (1922);
First Nat. Bank v. Eastman, 144 Cal. 487; 77 P. 1043 (1904);
Miller v. Davison, 31 Iowa 435 (1871);
Case v. Bartholow, 21 Kan. 300 (1878);
Winneth Times Pub. Co. v. Berg, 265 P. 710 (Mont. 1928);
Stone v. Anderson, 25 N. H. (5 Fost.) 221 (1852);
Abrahams v. Mitchell, 8 Abb. Prac. (N. Y.) 123, 341 (1859);
Jenkins v. Fahey, 73 N. Y. 355 (1878);
Garfein v. McInnis, 227 N. Y. S. 85, Aff'd. 248 N. Y. 261; 162 N. E. 73 (1928);
Winter v. Winter, 256 N. Y. 113; 175 N. E. 533 (1931);
Fidelity & C. Co. v. Green, 200 N. C. 535; 157 S. E. 797 (1931);
Williams' Adm'rs. v. Welton's Adm'rs., 28 Oh. St. 451 (1876);
George Norris Co. v. Levin's Sons, 81 S. C. 36, 61 S. E. 1103 (1908);
Rozink v. Becker, 68 Wash. 68, 122 P. 593 (1912);
Pier v. Amory, 40 Wis. 571 (1878);
Snyder v. Breitinger, 139 S. E. 755 (W. Va. 1927).

Thus it is clear that when sufficiently authorized by statute a court's process of notification may run to a foreign country in such a way as to give the court jurisdiction over matters subject to its territorial jurisdiction. In other words it satisfies due process as to notice. The duty of

allegiance owed by the appellant to the United States gave the court below, by virtue of the Walsh Act, such territorial jurisdiction as authorized the order of recall. The order of recall having been made due process as to notice thereof could be satisfied by personal service outside of the territorial jurisdiction of the court even in a foreign country.

4. Constructive Service by Publication is Sufficient for Judgment in Personam Against a Citizen.

Luria v. United States, 231 U. S. 9 (1913).

This was a proceeding under Section 15 of the act of June 29, 1906, (34 Stat. 596, 601 c. 3592) to cancel the certificate of naturalization issued to Luria. The statute provided:

> "* * * and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or place where such suit is brought." (page 20)

Luria had resided in Transvaal, South Africa, for approximately 18 years and did not return for the hearing. Although he filed an answer and no special question was raised as to the validity and significance of notice by publication under such circumstances the statutes together with the following observation of the court seems very significant:

> "Several contentions questioning the constitutional validity of Section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights

> acquired through lawful naturalization, but only provides for the orderly cancellation, *after full notice and hearing,* of certificates of naturalization which have been procured fraudulently or illegally." (page 24)

The one question referred to in the above quotation was as to the validity of the prima facie fraudulent effect given by the statute to return to the country of nativity or taking permanent residence in any other foreign country within five years after the issuance of such certificate. That provision of the statute was held valid.

Although, under the statute involved in the *Luria* case, it is the practice to give personal notice of such a proceeding through an American consul, (*infra* p. 84), still such personal service is not required as to absentees and nevertheless the opinion observes that the citizen has "full notice" by publication. The proceeding is for a judgment *in personam* that the citizen's naturalization was fraudulent or illegal. Of course it is *quasi in rem* to the extent that the court preliminarily seizes upon the citizenship status as a basis of jurisdiction. Likewise the court issuing a subpoena under the Walsh Act is acting *in personam* and *quasi in rem* to the same extent as in cancellation of naturalization cases.

Douglas v. Forrest, (1828) 4 Bing. (Eng.) 686.

A Scottish court's decree in a suit *in personam* on an acknowledged debt was enforced by the English court even though the Scottish decree was rendered against the defendant Scotchman while he was absent in India upon notice by proclamation. Chief Justice Best, in delivering the opinion, said (page 702):

> "A natural born subject, of any country quitting that country but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation."

This case was followed in *Cowan v. Braidwood,* (1840) 9 Dow. P. C. (Eng.) 26, 33-7, and in accord with it see *General Steam Navigation Co. v. Guillou,* (1843) 11 M. & W. (Eng.) 877, 894.

Mabee v. McDonald, infra, the decision of the Supreme Court of Texas, supports jurisdiction *in personam* of citizens upon service by publication. This Court reversed the decision (*McDonald v. Mabee, infra*), without disapproving of the reasoning of the Texas court, but because this Court took a different view of the facts as to the residence, and therefore the citizenship of Mabee. The decision of this Court was so interpreted by the Texas Court of Civil Appeals in *Becker v. Becker,* 218 S. W. 542, 545 (1920). And this Court cites *McDonald v. Mabee* as a non-resident case in *Hess v. Pawloski, infra.* Nevertheless, we prefer to cite the Texas case under our next heading because of language in the opinion of this Court.

If service by publication only is inadequate for a proceeding purely *in personam* against a citizen (not involving preliminary seizure of a *res* or action in reliance upon a *status*) it is not because the court lacks jurisdiction of the person or personal relations of the citizen but because the quality of such service does not satisfy due process for the reason that other methods were available and more likely to result in actual notice to the citizen abroad. (50 *C. J.,* p. 500, §111.) Thus, service by publication when sufficient is valid because the circumstances are such (impossible to locate his last place of abode in the state or nation or to discover his address abroad, 50 *C. J.* p. 547, §224) that there is no other reasonably available method of service and because the presumption can be fairly indulged that actual notice will reach the citizen abroad.

The point we make is that indirect service of notice in a foreign country is not "an invasion of foreign sovereignty" and it is not the nature of the "command" or notice that can be considered offensive.

5. Substituted Service by Leaving Summons at Last Place of Abode is Sufficient for Judgment in Personam Against an Absent Citizen.

McDonald v. Mabee, 243 U. S. 90 (1917).

We gather implied authority from the decision of this Court in this case for the validity of extra-territorial service upon absent citizens for a judgment in *personam*, and, in order to fully understand the decision, we believe it is necessary to consider the facts and the opinion of the Supreme Court of Texas from which it came to this Court. (*Mabee v. McDonald*, 107 Tex. 139 (1915)).

The *Mabee* case was a suit upon a promissory note. The defense was primarily that the plaintiff had recovered a judgment upon the same note in a previous Texas suit, which judgment purported to bind the defendant personally as well as to foreclose a lien by which the note was secured. At the institution of the former suit, the defendant Mabee was domiciled in Texas but had left the state with intent to establish a home elsewhere, his family, however still residing there. He subsequently returned to Texas for a short time and later established a Missouri domicile. Service was effected by publication in a newspaper after the defendant's final departure from Texas. In holding that the defendant was still a Texas citizen and that such service of process was valid, the court reviewed the English and American decisions, stated that the doctrine of *Pennoyer vs. Neff* was now settled law in Texas and the United States *as to non-residents*, and then enunciated the doctrine of sovereign control by the state over its absent citizens in the following language (pp. 173-174):

> "The ground upon which that doctrine rests has been stated thus:
>
> 'Every subject or citizen of a country where legal proceedings are instituted owes allegiance to

his country and submission to its laws. He impliedly consents to be bound by its laws so long as he remains a citizen and resident; *and when the state enacts a statute with reference to procedure every citizen of necessity consents, and no matter where he may be does not change that assent until he renounces his former allegiance and in fact becomes a non-resident.'*

Dissenting opinion in *Raher v. Raher, supra* (129 N. W. 494 (Iowa 19th)). To the same effect is the dissenting opinion from our court of civil appeals in the case before us."

"This may be added: The laws of a state bind its citizens, whether they be considered as assenting thereto or not."

"Among the authorities which support said doctrine of sovereign control with more or less force are these:

(Citation of authorities follows.)

"In the majority opinion in *Raher v. Raher, supra,* decided Jan. 19, 1911, it was said: 'It must be conceded, however, that we have found no case in which it has been specifically held under pertinent facts *that a personal judgment against a resident, who is actually served with notice outside the territorial limits of the state is void.'* In the dissenting opinion therein it was said:

'No court, so far as I have been able to find, has gone to the extent (to) which the majority find it necessary to go in this case.'

"*Black on Judgments,* 2nd ed., says in par. 227:

'Every sovereignty has plenary control over its own subjects, and it may *authorize a judgment to be rendered against one of its citizens, upon constructive notice only, and although he is temporarily absent from its dominions,* and such a judgment must be everywhere recognized as valid and of binding force and effect.' See also, par. 907.

"*Freeman on Judgments*, 4th ed., par. 570, says:

'In relation to the extraterritorial effect of a judgment procured against a person in the state of his domicile, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that state, radical and irreconcilable difference of opinion exist. * * * *The position, however, which seems to be the best sustained, both by reason and by precedents, is that each state has the authority to provide the means by which its own citizens may be brought before its court; that the courts of other states have no authority to disregard the means thus provided, and finally, that every judgment or decree obtained in a state against some of its citizens, by virtue of a lawful though constructive service of process, should be as obligatory upon such citizens in every other state as it is in the state whence it is taken.*' "

In the opinion of this Court by Mr. Justice Holmes reversing the Texas court upon the ground that Mabee was not at the time a citizen of Texas (*Hess v. Pawloski, infra*, and *Becker v. Becker, supra*), it is said, 243 U. S.:

(p. 91) "No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation (physical power) should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. * * *

(p. 92) "There is no dispute that service by publication does not warrant a personal judgment against a *non-resident.*" (This is equivalent to "non-citizen.") (Our parentheses).

"Some language of *Pennoyer vs. Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun Mabee, although technically domiciled in Texas, had left the State intending to establish his home elsewhere. Perhaps in view of his technical position

and the actual presence of his family in the State a *summons left at his last and usual place of abode would have been enough. * * * To dispense with personal service the substitute that is most likely to reach a defendant is the least that ought to be required if substantial justice is to be done.*"

The language just quoted is very significant. First, it recognizes that jurisdiction may be acquired over non-residents in other ways than by personal service within the territorial limits of the state or by appearance. This statement construed in the light of the opinion of the Supreme Court of Texas implies recognition of jurisdiction by virtue of the allegiance due from a citizen provided there is a foundation of physical power. We have shown that physical power, coercive power, exists in the case of citizens in four respects at least. Second, the language of Mr. Justice Holmes indicates that a summons left at the last and usual place of abode would have been enough because it is a method of substituted service most likely to actually reach the defendant. In other words the notice, even though as far as the officials are concerned, is delivered within the territorial limits, is calculated to be forwarded and actually received outside of the territorial limits.

Substituted service is deemed personal service. (50 *Corpus Juris*, p. 490, § 94.) Of course when actual personal service is made outside of the territorial limits there is no cause for resort to fiction and circuitous justification and no doubt that substantial justice is done.

Many states have statutes permitting personal judgments to be obtained against domiciled-resident-citizens even though temporarily absent from territorial limits if service is made (1) by leaving the summons at the defendant's last place of abode, or, (2) by publication and mailing to or personal delivery to the defendant outside the

state. These statutes, if calculated to afford reasonable notice are constitutional. (See note in Vol. 35 of Lawyers' Reports Annotated (N. S.), pages 292 *et seq.*)

Langdon v. Doud, 88 Mass. 423, 435;
Henderson v. Staniford, 105 Mass. 504, 505;
Nichols v. Vaughan, 217 Mass. 548.

In the latter case the question presented was whether the Massachusetts statute of limitations had been tolled by the absence of the debtor in Europe during a period of approximately seventeen years. The contention was urged that the statute ran only during such period of time as personal service of process could have been made within the jurisdiction. The court held the statute was not tolled because under the Massachusetts practice actual notice of a pending action was sufficient to support a personal judgment rendered against an absent citizen. Chief Justice Rugg quotes approvingly from Chief Justice Bigelow in *Langdon v. Doud,* 88 Mass. (6 Allen) 423 at 425, the following:

> "So long as a debtor has a last and usual place of abode in the commonwealth, that is while he retains his domicile or residence here, the courts of the state have jurisdiction over him and due service of legal process can be made upon him. * * * a writ can be served by leaving a summons at his last and usual place of abode, and in case of his absence from the state actual notice * * * can be given to him so that a valid and binding judgment can be obtained."

Here again we see that notice is to reach the absent citizen in foreign territory, yet such statutes are not invalid as calling for an invasion of foreign sovereignty either where the notice is implied or where it is mailed or where it is directly and personally served.

6. A Person May Give Implied Consent to Personal Service in Foreign Territory.

If a person may give implied consent to service of process upon himself in a foreign sovereignty, clearly such service is not an invasion of the sovereignty of the state or nation for no individual can waive the immunity of a government against violation of its rights under international law.

In *Hess v. Pawloski*, 274 U. S. 352, 355 (1927), the Massachusetts statute, providing that use of the highways by non-residents constitutes an implied appointment of the Registrar to receive process for any proceeding growing out of any accident, the statute including provision for personal service by mail outside of the state was held constitutional.

Wuchter v. Pizzutti, 276 U. S. 13 (1928).

This case involved the validity of a New Jersey statute like that in *Hess v. Pawloski, supra*, except that personal service by mail was not required. In the opinion by the late Mr. Chief Justice Taft, it is said (page 24):

> "These cases (*McDonald v. Mabee, supra* and *Roller v. Holly*, cited *infra*, among others) and others indicate *a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with the defendant will receive actual notice*, and that is the principle that we think should apply here.
>
> "But it is said that *the defendant here had actual notice by service out of New Jersey in Pennsylvania.* He did not however, appear in the cause and such notice was not required by the statute. *Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it.*"

(Applied in *Gilbert v. Burnstine*, 255 N. Y. 348; 174 N. E. 706 (1931).)

These last two cases, *Hess v. Pawloski* and *Wuchter v. Pizzutti*, construed together show plainly that even in an action *in personam*, the service of notice outside the territorial jurisdiction of the state is proper and will satisfy the requirements of due process as to notice. The right to give such notice extra-territorially to such a non-resident and therefore alien is predicated upon implied consent. In the case at bar, no implication is necessary for the appellant's citizenship gave the United States, and, through the Walsh Act, the court the necessary jurisdiction, or, one may say, the inherent consent of the appellant.

Once more extra-territorial service of notice does not seem to be considered an invalid invasion of a foreign sovereignty. Since it is the extra-territorial notice that is vital, we think it follows that, pursuant to such implied consent, the formality of serving a state official could be dispensed with if the statute required personal service upon the defendant wherever found. Cognovit notes are an instance of express consent pursuant to which no substituted service on a state official is necessary.

7. Citizenship Supports Jurisdiction in Personam Upon Extra-Territorial Personal Service Only.

In the recent South Dakota case of *In re Hendrickson*, 167 N. W. Rep. 172 (1918), service of process in Minnesota upon an absent South Dakotan was sustained in a suit to appoint a guardian for a mental incompetent. The opinion reviews at length the Texas case of *Mabee v. McDonald*, the Iowa case of *Raher v. Raher*, and the other state decisions and decides that a state may render a valid personal judgment against an absent citizen or resident not served personally with process within the state. The following quotation is from the opinion (p. 174):

"Since the opinion in the *Raher* case the Supreme Court of Texas has given this matter just as thorough consideration as did the learned Justice McClain in the *Raher* case, and has arrived at the opposite result in the case of *Mabee v. McDonald,* 107 Tex. 139, 175 S. W. 676, basing its decision largely upon the principle of the amenability of the citizen of a state to its laws and upon the right of a state to provide by statute for the character of the service of process that may be made upon the absent citizen, in which view we concur."

"A review of the many decisions of the courts of this country is unnecessary, for they have all, or nearly all, been exhaustively reviewed in the *Raher* case and in the Texas case. * * *"

"It must be conceded, under the statutes above referred to, and under the great weight of judicial authority, that, if the citation had been served by leaving a copy at the Salmonson home in Brookings County with the proper member of the family, no question could have been successfully raised as to the character of the service. In the case note to the *Raher* case the scholarly annotator in 35 *L. R. A.* (N. S.) on pages 296, 297, has critically analyzed the situation, and by what seems to us to be unanswerable logic, has arrived at the same conclusion as the Texas court. We should like to adopt the whole of his 'conclusion' as a part of this opinion but space forbids more than the following portions: * * *

"We therefore conclude that under our laws, which do not violate the principles of due process of law insofar as absent citizens of this state are concerned, the County Court of Hamlin County acquired jurisdiction over the person of the alleged incompetent by the service of the citation upon her in the State of Minnesota."

The appellant cites *De La Montanya v. De La Montanya,* 44 Pac. 345 (Calif. 1896). (B. 8, 15). In that case the court held service by publication conferred no jurisdiction to render a personal judgment for alimony in a divorce proceeding against a citizen of California who had gone to

France. The majority opinion relies chiefly upon language in *Pennoyer v. Neff,* 95 U. S. 714 (1877), whereas that was a case involving a non-resident and hence a non-citizen. And in the syllabus prepared by Mr. Justice Field, himself, (24 L. ed. 565, foot-note) the law of the case is confined to non-residents. The *De La Montanya* case was a five to three decision in which the Chief Justice was one of the dissenters. In line with this Court's opinion in *McDonald v. Mabee, supra,* the decision might have gone on the inadequacy of service by publication only but the opinion of the majority is not so restricted.

Another case cited by the appellant is *Smith v. Grady,* 68 Wis. 215; 31 N. W. 477. (B. 15) While it appears from the statement of facts preceding the opinion that the defendant resided in Ontario the opinion itself said that he was not a resident of Ontario. The foot-note following the opinion in 31 N. W. cites other cases in which service outside of the territorial jurisdiction of the court upon *non-residents* has been held to be invalid, thus the view of the case is indicated as being a non-resident case.

Raher v. Raher, 150 Iowa, 511; 129 N. W. 494 (1911), is cited by the appellant. (B. 15) In that case a personal judgment on personal service of process made on a resident out of the state was held invalid. Chief Justice Sherwin and Mr. Justice Deemer concurred in a dissenting opinion.

The Supreme Court of Texas in *Mabee v. McDonald, supra,* and the Supreme Court of South Dakota, in the *Hendrickson* case, preferred the reasoning of the minority opinions in the *De La Montanya* and *Raher* cases. And, as aforesaid we believe this Court in *Mabee v. McDonald, supra,* approved of the reasoning of the Supreme Court of Texas, except as to the quality and therefore due process of service upon a non-resident citizen by publication only when service at his last place of abode was possible.

The careful editors of Lawyers' Reports Annotated (n. s.) Vol. 35, before and without the advantage of the opinions in the *Mabee v. McDonald* and the *Hendrickson* cases agreed with the minority opinions in the *De La Montanya* and *Raher* cases and concluded: (page 297)

> "Certainly, from a practical point of view whatever may be said in its favor from a technical legal point of view, a doctrine which concedes the efficacy of a kind of service which at most only renders probable actual notice to a resident defendant of the pendency of the suit, and denies the efficacy of a mode of service which insures actual notice, although imparted by an act which takes place out of the state, has but little to recommend it."

(a) *Non-Resident cases affecting aliens cited by appellant are not in point.*

The appellant cites many cases which hold that a state court may not render a personal judgment against an absent alien who was not personally served with process within the state and who did not voluntarily enter appearance. Cases of this type do not embrace the element of citizenship with its duty of allegiance as a basis for jurisdiction. Process of a state against a non-resident is process against a non-citizen (first sentence of the 14th Amendment), whereas, process against a non-resident of the United States may, nevertheless, be process against a citizen of the United States. So the decisions denying the validity of state process on a non-resident of the state, served without the state, are inapplicable to the cases at bar.

Pennoyer v. Neff, 95 U. S., 714 (1877), is cited by appellant (B. 24). Neff sued Pennoyer for possession of land in Oregon. Neff claimed under a United States patent and Pennoyer claimed under a sheriff's sale upon execution for a judgment of an Oregon state court in an action by Mitchell

against Neff upon a money demand on account for service as an attorney. Neff was then a non-resident and service was by publication under the Oregon statute. The Supreme Court held that the Oregon court had no jurisdiction under such service to render the judgment in the *Mitchell* case and affirmed judgment for Neff. It is said in the opinion of the Supreme Court, referring to the Oregon statute (page 720):

> "Construing this latter provision to mean that in an action for money or damages, where a defendant does not appear in the court, and is not found within the State *and is not a resident thereof,* but has property therein, *the jurisdiction of the court extends only over such property,* the declaration (of the statute) expresses a principle of general, if not universal law."

The opinion also quotes from Mr. Justice Story in *Picquet v. Swan,* 5 Mason 35 (1848), (cited by appellant, B. 24) as follows (page 724):

> "Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, *and is not personally subject to its laws,* if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam,* for the plain reason, that, *except so far as the property is concerned,* it is a judgment *coram non judice.*"

(See note 35 L. R. A. (N. S.) 292, 297.)

Galpin v. Page, 18 Wall. 350 (1873), is cited by appellant (B. 24). This case involved the validity of a Cali-

fornia state court judgment against an infant resident of New York, pursuant to constructive service by publication. The Supreme Court held such judgment *in personam* was invalid upon the ground that the laws of one state as to service of process could not give authority for valid process against a non-resident (and thus a non-citizen). It is said in the opinion, page 369:

> "When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, *not a citizen of the state*, nor found within it every prineiple of justice exacts a strict and literal compliance with the statutory provisions."

Harkness v. Hyde, 98 U. S. 476 (1878), is cited by appellant, (B. 25). In that case, the territorial court of Idaho issued summons to be served upon the defendant in an Indian reservation which was not subject to the territorial jurisdiction of the territory of Idaho. The defendant was not a resident of the territory of Idaho and "not personally subject to its laws," hence, a judgment on such service was void. Appellant does not emphasize the only language in the opinion applicable to the cases at bar and that we will quote here (B. 47), page 478:

> "It is only where property of a non-resident or of an absent defendant is brought under its control, *or where his assent to a different mode of service is given in advance* that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him or his voluntary appearance to the action."

Wilson v. Seligman, 144 U. S. 41 (1892), is cited by appellant (B. 25). The judgment sued upon in that case was rendered in an action in a Missouri state court and the Supreme Court emphasized that defendant "never was

a citizen or a resident of Missouri" but was served at his domicile in New York.

Cooper v. Reynolds, 10 Wall. 308 (1870), is cited by appellant (B. 24), as being a case holding that a state court may not render a personal judgment against an absent citizen who was not personally served with process within the state and who did not voluntarily appear. *As a matter of fact, the defendant had departed for parts unknown and it was not determined that he was a citizen at the time in question. Service was by publication only.* The judgment determining his personal obligation was sustained to the extent of the *res* that had been seized. In the opinion of the court by Mr. Justice Miller, how a proceeding basically *in personam* becomes *quasi in rem* is explained (318):

> "If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.
>
> "That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: *first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other*

property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.

"Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem.*"

The nature of *quasi in rem* proceedings is also stated in *Freeman v. Alderson,* 119 U. S. 185 (1886).

None of the other cases cited by the appellant deal with the rights of a sovereign and its courts and executive officers duly authorized by statute with respect to absent citizens. Therefore, language in some of them to the effect that for a judgment *in personam* there must be service of process within the territorial limits of the sovereign or voluntary appearance of the defendant, in the light of the facts and issues, could not be intended as a completely inclusive and exclusive statement of law. If it were, then there would be no way to account for the many decisions of this Court sustaining judgments *in personam* upon express or implied consent in advance of the bringing of the action, or the many cases *quasi in rem,* which primarily adjudicated alleged personal obligations. Thus, we think it will be sufficient to merely list the appellant's other authorities of this type:

Boswell's Lessee v. Otis, 9 How. 336, 348 (1850), (B. 25);

Freeman v. Alderson, 119 U. S. 185 (1886), (B. 25);

Overby v. Gordon, 177 U. S. 214 (1899), (B. 25);

Brown v. Fletcher's Estate, 210 U. S. 82 (1908), (B. 25);

Baker v. Baker, Eccles & Co., 242 U. S. 394 (1917), (B. 25);

Goldey v. Morning News, 156 U. S. 518 (1895), (B. 25);

Moss v. Fitch, (Mo.) 111 S. W. 475 (1908), (RB. 15);

Indiana Transportation Co., Ex Parte, 244 U. S. 456 (1917), (B. 28);

Herndon v. Ridgeway, 17 How. 424 (1854), (B. 25).

F. A COURT'S JURISDICTION TO SUBPOENA WITNESSES IS NOT LIMITED TO ITS TERRITORIAL JURISDICTION OR ITS PHYSICAL POWER OVER THE PERSON OF THE WITNESS.

Generally, that is without special statutory authority, such as supplied by the Walsh Act, a court may not subpoena witnesses from outside its territorial jurisdiction but if the necessary legislative authority has been given to the court, and to the executive or administrative officers who are to carry out its orders, witnesses may be subpoenaed from anywhere provided the desired witness is in such relation to the state or nation that he owes an obligation and duty to obey its laws.

The case so much relied upon by the appellant in his briefs, *Robertson v. Railroad Labor Board*, 268 U. S. 619 (1925), supports our position. That case concerned the interpretation of the power of the railroad labor board under the transportation act of February 28, 1920, (c. 91 Section 310, Par. a & b, 41 Stat. 456, 472) to subpoena witnesses from any place in the United States and in case of failure of the desired witness to comply with the subpoena the right to "invoke the aid of any United States District Court." Robertson was served in Ohio with a subpoena to appear before the board at Chicago, Illinois. He did not

attend. The board brought proceedings in the Federal District Court for Northern Illinois in contempt. The summons in contempt was likewise served upon Robertson in Ohio. He objected to the jurisdiction of the court in Illinois, and this Court held, purely upon the interpretation of that statute, as a matter of venue, that Congress intended that the punishment proceedings would be in the Federal Court of the district where the witness resided. The opinion of this Court cites many instances (page 624) in which Congress had authorized writs of subpoena or summons to bring in parties from other jurisdictional districts than that of the court in which the proceeding was pending. It is also said (page 622):

> "Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States. * * * But it has not done so either by any general law or in terms by Sec. 310 of Transportation Act, 1920. The precise question is whether it has impliedly done so by that provision."
>
> "In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. *Under the general provisions of law,* a United States District Court cannot issue process beyond the limits of the district, (citing authorities); and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. (Citing authorities.) Such was *the general rule* established by the Judiciary Act of September 24, 1789, c. 20 Sec. 11, 1 Stat. 73, 79, in accordance with the practice at the common law, (Citing authorities) and such has been *the general rule* ever since."

In this case the court was dealing with a purely *in personam* as distinguished from a *quasi in rem* method of enforcing the attendance of the witness and not with the

scope of the power to subpoena. The court was not dealing with the power to authorize an officer to serve papers outside the territorial limits of his sovereign. The court was dealing with the rule established by the judiciary act and that existed at common law and was not considering the power to change the common law or the rule established by the judiciary act so as to permit jurisdiction *in personam* upon service without the territorial jurisdiction of the court. The language used on page 626 of the opinion shows plainly the view of this Court that if the statute had so provided the federal court for Illinois could have adjudicated the contempt charge even though the witness was beyond its territorial jurisdiction. The judgment of the Federal Court in Illinois might have been unenforcible by such court without affecting the validity of its judgment. This is brought out in another case much relied upon by the appellant in his briefs:

Michigan Trust Company v. Ferry, 228 U. S. 346 (1913).

Ferry was executor of an estate in Michigan and before being discharged moved to Utah. An administrator *de bonis non*, with the will annexed brought suit for an accounting in the original probate proceeding. Service of summons was under the Michigan statute by publication and personally in Utah. A personal judgment was rendered against Ferry for money of the estate appropriated to his own use. The judgment was sustained and it is said in the opinion:

> "*Ordinarily*, jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. * * * (353).
>
> "It is true that it (the decree) could not be enforced in Michigan while the defendant remained out of the state. *But while the want of power to enforce*

*a judgment or decree may afford a reason against entertaining jurisdiction (Giles v. Harris, 189 U. S. 475, 488 * * *), it has nothing to do with the validity of a decree when made.* * * (355-6).

"Jurisdiction is power, * * *." (356)

The court was careful to say it is only "ordinarily" that jurisdiction over a person is based on power to seize the person. It went on to say that jurisdiction is power and we have shown that there are at least four things which may be within the power of the sovereign with respect to the relation of the citizen to it. Further the court said that want of power to enforce a judgment does not necessarily affect its validity. Likewise, the fact that even under the Walsh Act or any possible legislation of the Congress, except pursuant to treaty, the appellant could not be bodily attached and brought to the United States, does not affect or bear upon the validity of the order of recall.

Toland v. Sprague, 12 Peters 300, (1838), (B. 25) holds, (p. 329):

"* * * the process of a circuit court cannot be served without the district in which it is established, *without the special authority of law therefor.*"

Minder v. Georgia, 183 U. S. 559 (1902), (B. 24) is another case in which there was no citizenship to create a duty to obey the subpoena of a foreign state and no statute authorizing the officer to make an extra-territorial service.

See also: *Jennings v. Johnson,* 148 F. 337, 339 (5th C. C. A., 1906).

The Walsh Act is ample for the cases at bar.

In addition to the instances cited in the opinion in the *Robertson v. Railroad Labor Board, supra,* in which the Congress has authorized subpoenas and summons to run beyond the territorial jurisdiction of the court, we cite R. S. Sec. 876; U. S. C. A. tit. 28, Sec. 654; Sept. 19, 1922,

c. 344, 44 Stat. 848. That statute authorizes subpoenas to run into any district in criminal cases and for a limited time the same was authorized in civil cases.

In addition to the *Michigan Trust Company v. Ferry* case, *supra*, we have cited decisions of this Court illustrating at least two other situations in which jurisdiction *in personam* exists for a valid judgment or decree even though the circumstances may be such that the judgment is unenforcible in the state or nation where rendered. We refer to *McDonald v. Mabee, supra*, where this Court indicates substituted service at the last residence of the absent citizen would be sustained and to *Hess v. Pawloski* and *Wuchter v. Pizzutti, supra*, in which service upon a statutory agent appointed by implied consent followed by personal service outside of the state, is held to support a judgment *in personam*. In neither case does the court or sovereign have power to seize the defendant and the probabilities are, especially in the latter type of cases, that there will be absolutely no way of enforcing the judgment in the state where rendered.

The appellant conceded, at pages 77 and 78 of his brief in the Court of Appeals:

> "But Congress may pass laws prescribing certain prohibitions to be observed by our citizens abroad * * *.
>
> "* * * The citizen, as was expressed by one writer, 'carries such laws around his neck,' but no sheriff accompanies him to enforce obedience."

So the appellant argues the United States can not invade another nation to attach the person of a desired witness and forcibly return him to the court. *Glass v. The Sloop Betsey*, 3 Dallas 6 (1794), (B. 25) is cited for the proposition that the United States can not exercise such power extra-territorially in the absence of treaty. The appellant cites *Rose v. Himely*, 4 Cranch 241 (1808) (B. 28); *United States v. Rodgers*, 150 U. S. 249 (1893), (B. 28); *The Hamil-*

ton, 207 U. S. 398 (1907), (B. 28); *American Banana Company v. United Fruit Company,* 213 U. S. 347, (1909), (B. 28); *United States v. Bowman,* 260 U. S. 94 (1922), (B. 28); and *Wheaton on International Law,* 8th ed. Sec. 113, pages 179, 180, (B. 30), for the proposition that all power over a citizen abroad must be exercised at home.

The Walsh Act prohibits citizens from remaining abroad after they are notified that they are wanted at home—the citizen carries that prohibition around his neck. All power "is exercised" at home under the Act, but the citizen is given "due process" by notice while abroad as to what is going on at home.

As we have many times said, coercive power exists, and actual physical power over the desired witness due to his presence within the territorial jurisdiction of the court, is unnecessary. A case like *Johnson, In re,* 167 U. S. 120 (1897) cited by the appellant, (B. 25) is not in point for it involved criminal jurisdiction. Of course, where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive the sentence of the court, actual physical power over the accused may be necessary.

G. THE ACT OF SERVING A SUBPOENA IS A MINISTERIAL ACT OF GIVING NOTICE AND NOT AN EXERCISE OF "JURISDICTION."

The obvious theory of the Walsh Act is that if the court grants a petition for the recall and appearance of a citizen desired as a witness that the court thereby takes cognizance of and jurisdiction over the witness's status as a citizen and his relation to the United States and creates an obligation and duty of the citizen to return. But so far it is not such an obligation and duty as would authorize enforcement of a penalty for non-compliance. This is solely because due process and natural justice call for notice to

the citizen of the creation of his obligation and duty. It was a potential obligation, inherent in his citizenship, but he must have notice that it has been changed to an actual obligation. In changing the potential obligation and duty, over which the court always had jurisdiction pursuant to the Walsh Act, to an actual obligation and duty the court is no more exercising jurisdiction over his person than when two parties in different nations create obligations and duties of a contract by correspondence. To pursue the illustration further, the citizen by virtue of his citizenship inherently and necessarily authorizes his sovereign to create an obligation and duty of the citizen to return which the sovereign has the power and right to exercise, through its courts, and when the court does act the obligation and duty is as complete as when an offer of contract having been tendered is properly accepted.

So the Walsh Act requires as the second step that which is necessary to due process—notice—and exercises an option as to the form of the notice by specifying that it shall be in the form of a subpoena. That a subpoena is specified does not change the nature or function of what is required or what is given. Form yields to substance. As Mr. Justice Sutherland said in the opinion of this Court in *United States v. La Franca,* 282 U. S. 568, 572 (1931):

> "No mere exercise of the art of lexicography can alter the essential nature of an act or a thing, * * *"

It is said in 50 *Corpus Juris,* p. 442 § 1:

> "As employed in statutes the legal meaning of the word 'process' varies according to the context, subject matter, and spirit of the statute in which it occurs." (See also, *id.,* p. 443, § 3; and *Stevens v. Associated Mtg. Co.,* 107 N. J. Eq. 297, 152 A. 461 (1931) and *Emmerson v. Emmerson,* 129 Okl. 144, 265 P. 1078 (1928).)

The subpoena would have to be followed with a writ of bodily attachment before it would be anything more than

a notice, but even if the subpoena were considered a command which was being given in the foreign nation rather than in the United States, where in truth it is given, we have shown that the appellant has necessarily, in view of the authorities, conceded that such a command is not a violation of international law or in excess of the extra-territorial jurisdiction of the United States.

The remainder of the Walsh Act specifies the procedure which may be followed in case the citizen fails to fulfill his obligation and duty.

When it is said that the issuance and the service of a summons is an exercise of jurisdiction over the person summoned it is the issuance and not the service that is the exercise of jurisdiction except in so far as the service is necessary to due process, and hence to the jurisdiction of the court to render a valid judgment, and not in the international law sense. Of course there may be other kinds of process than subpoenas and summons which are, in their execution, an exercise of jurisdiction, such as writs of attachment. Also if the court has not taken jurisdiction of a subject matter, such as property, or a status such as citizenship, which is within its jurisdiction, the process may more properly be termed a jurisdictional act and command rather than a mere notice. But when the court has taken cognizance of and jurisdiction of a subject matter within its territorial jurisdiction its initial process in essential nature is a mere notice to come in and testify or defend or the consequences may be a default judgment or a penalty provided by statute as in the Walsh Act. (50 *Corpus Juris*, p. 467, § 56.) In other words, when the process runs to a person who is under no duty to the sovereign, whose duly authorized court issues the process, to obey the process or suffer the consequences, the process can more properly be called jurisdictional in other senses than for want of the notice necessary to due process. But when the duty pre-

exists, the process, no matter what its form may be, and under the Walsh Act, is a mere notice.

In *Bradey v. Mueller,* (22 So. Dak. 534) 118 N. W. 1035 (1908), it is said:

> "The main object of the summons is to notify the defendant that the plaintiff claims to have a cause of action against him and that he is required to answer such complaint." (P. 1037.)

We also cite:

Nichols v. Burlington, etc. Co., 4 G. Greene, (Iowa) 42 (1853);

Klingel v. Palmer, 42 Iowa, 166 (1875);

Zielica v. Worzalla, 162 Wis. 603; 156 N. W. 623 (1916);

Whitney v. Blackburn, 17 Ore. 564, 571, 21 P. 874 (1889);

Murphy v. Campbell Soup Co., 44 F. 2nd 214 (D. C. Mass. 1930);

Flannery v. Kusha, 143 Minn. 308; 173 N. W. 652 (1919);

In re Martin, 86 N. J. Eq. 265; 98 A. 510 (1916);

Sheldon v. Sheldon, 134 A. 904 (N. J. Ch. 1926);

Herndon v. Wakefield-Moore Realty Co., 143 La. 724; 79 So. 318 (1918);

Harrington v. Superior Court, 194 Cal. 185; 228 P. 15 (1924);

Williams, Adm'rs v. Welton's Adm'rs, 28 O. S. 451, 471 (1876).

We admit that the issuance of the subpoena by the court is an assertion of power. The order issuing the subpoena is a judicial act in conformity with the Walsh Act. A process is deemed issued when ordered by the court and ready for service. *McIntosh v. Standard Oil Co.,* 236 N. W. 152 (Neb. 1931); *Society v. Whitcomb,* 2 N. H.

227 (1820); *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296 (1896). We assert that the *service* of the subpoena is simply notice the power has been exercised. We deny that the giving of notice thereof by the consul to a citizen abroad offends international law. We think the foregoing makes it unnecessary to show the applicability of the principles we have established, to the language of this Court in *Robertson v. Railroad Labor Board, supra,* and in *Michigan Trust Company v. Ferry, supra,* which are cited by the appellant. (B. 24.)

The carrying out of an order of court is an executive or ministerial function. A marshal in serving a subpoena, a summons, or in making an attachment or sale on execution, pursuant to order of court, is executing and administering the order from the court. He is classified in the executive branch of our government. Under Section 61 of the Restatement of the Law of Conflict of Laws, proposed final draft No. 1, of the American Law Institute, Comment D is:

> "When a court acts not to give a judgment but to affect directly a person or thing through the act of its officer it acts executively.
>
> *Illustration:*
>
> 3. The marshal of a court of equity by order of the court attaches a person for contempt. The state through the officer of the court is exercising executive jurisdiction."

The act of making the service of the subpoena upon an absent citizen pursuant to an order of court is one which the Congress could just as legally and lawfully have authorized the court to do through any private person. It is said in Comment b., under Section 62 of the said Restatement of the Law of Conflict of Laws:—

> "An act which has certain legal consequences if performed by a private person, has the same conse-

quences if performed by a public officer though outside the state of which he is an officer."

A subpoena is such a process that, except as required by statute, it could be served by a private person with equal validity as when served by an officer.

Cummings v. Akron Cement & P. Co., Fed. Cas. No. 3473 (1869);

Gordon v. Scott, Fed. Cas. No. 5620 (1868);

United States v. Mitchell, 223 F. 805, 807 (1915);

King v. Davis, 137 F. 198, aff'd 157 F. 676 (C. C. A. Va. 1906);

Whitehead v. Collingwood, 220 Mich. 504; 190 N. W. 239 (1922);

First Nat. Bank v. Estenson, 68 Minn. 28; 70 N. W. 775 (1897);

Hollandsworth v. Stone, 47 W. Va. 773; 35 S. E. 864 (1900);

Donaldson v. Winningham, 62 Wash. 212; 113 P. 285 (1911);

England Bros. v. Young, 26 Okl. 494; 110 P. 895 (1910).

And in Comment c, under said section 62 of said Restatement of the Law of Conflict of Laws, it is said:

"An act abroad which is to be done by a certain designated officer of the state is effective if so done, if it does not require for its effect the exercise in the other state of governmental power.

Illustration:

4. By statute commissioners are appointed to take testimony in a foreign state; they proceed to the foreign state, administer oaths, and take testimony. The proceeding is effective."

In 50 *C. J.* at page 544, it is said in Section 216:

"Statutes authorizing personal service on nonresident defendants out of the state usually provide

by whom such service may be made, and service, to be valid, must be made by the person *or officer* designated."

This indicates that a sovereign may empower *an officer* to make a service of a process of notification in a foreign state or nation without violating the sovereignty of the foreign state or nation or international law.

H. SERVICE BY A CONSUL IS VALID EVEN IF NO TREATY DEALS WITH THE SUBJECT.

The appellant argues—

"Congress has no power to authorize United States consuls to serve process except as permitted by treaty." (B. 24, 29-30; RB. 6-8.)

Appellant's argument is built upon the assumption that service of the subpoena by consul is equivalent to sending an officer of the United States "to round up absent citizens for return to service" (B. 30) and possibly upon the theory that there is something peculiar about a consul that requires everything he does be authorized by a treaty. (B. 29; RB. 6-8).

It seems plain to us that there is nothing peculiar about being a consul which precludes the man so appointed and recognized from doing any act not authorized by consular convention with the country with which accredited that any other officer or messenger of the United States could do. In other words if we have made clear in the foregoing portion of our brief that the United States has the power and right to send a messenger to France to deliver the subpoena without a treaty with France, then there is nothing within or without the scope of international law that requires a treaty before the United States can use one of its consuls for that service. Likewise if the authorities we cite under this heading show that a consul may be the medium of com-

municating a command or notice of recall, inferentially, the right to give such command or notice in the manner prescribed in the Walsh Act is not a violation of international law.

Again we call attention to our understanding of the appellant's position—that it is not the command or notice that is said to be objectionable under international law to an independent sovereign but it is the manner of communicating the command or notice. It is the manner of communicating the command or notice which must be examined to see if it is an exercise of judicial sovereignty within a foreign territory. How can the physical act of a man walking on foreign highways and handing and reading the contents of a paper to a citizen and tendering him money be, in the eyes of international law, an act of judicial sovereignty?

In *Dainese v. Hale,* 91 U. S. 13 (1875), cited by the appellant (B. 29) the consul undertook to seize property as upon attachment. No treaty authorized him to exercise such sovereign judicial power. Can appellant compare such plainly judicial conduct with carrying and delivering a command or notice?

In *Re Ross, Petitioner,* 140 U. S. 453 (1891), cited by appellant (B. 29) the court was considering the effect of constitutional limitations upon the procedure in a consular court. In holding court a consul exercises a sovereign judicial power which, of course, calls for consent of the sovereign where court is held. Merely telling a citizen that his country has called him home can not possibly interfere with the peace, dignity and independence of the foreign sovereign.

Wheaton's International Law, 8th Ed. Sec. 110, pages 176-177, is cited by the appellant (B. 30). *Wheaton* says that treaties are to authorize consuls—

"* * * to exercise, over their own countrymen jurisdiction within the territory of the State where they reside."

The consuls that served the subpoenas upon the appellant did not attempt to exercise jurisdiction over him. The jurisdiction over him was exercised by the court in the United States.

The appellant refers to language in the case of *Dainese v. Hale* and *Ross In re, supra,* and possibly elsewhere, that the powers of consuls depend upon treaty. Such language must be interpreted in the light of its context, the facts to which the mind of the court was directed. The general statements in the opinions of courts can easily be misapplied if one loses sight of the issues of the case. *Bramwell v. United States F. & G. Co.*, 269 U. S. 483, 489 (1926); *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 136 (1928); *Robertson v. United States*, 287 F. 942 (1923). The context of such statements is that a consul may not exercise jurisdiction over citizens unless authorized by treaty. No case is cited by the appellant nor can we find one holding that consuls may not serve their country and its citizens in ways that do not interfere with the peace, dignity and independence of the foreign sovereign to which accredited without a treaty. As a general statement, the language relied upon by the appellant is too limited, for consuls have all the rights and privileges accorded by international law as well as those accorded by treaty. In *Wharton on International Law* (1886) it is said at page 787:

"The rights and privileges of consuls rest on the general law of nations and on treaty."

In the reprint of the United States Consular Regulations of 1896, as amended to August 1, 1931 it is provided in section 77:

"The fundamental rights and privileges of consular officers depend upon the principles of international law and the customs and usages of nations. Certain rights and privileges are also specifically guaranteed to them by treaties."

In said regulations, Section 149, it is provided:

"The powers and duties of consular officers in regard to their fellow citizens depend in a great measure upon the municipal law of the United States. No civil or criminal jurisdiction can be exercised by them over their countrymen without express authority of law or by treaty stipulation with the state in which they reside."

Cunard S. S. Co. v. Mellon, 262 U. S. 100 (1923).

Several suits by steamship companies operating passenger ships between the United States ports and foreign ports were brought against officers of the United States to enjoin threatened application of certain provisions of the National Prohibition Act. We call attention to that portion of the opinion dealing with the suits by foreign corporations and their ships of foreign registry. The metaphor that a merchant ship is a part of the territory of the country whose flag she flies, came into question for application. The real principle was said to be one more of personal than of territorial sovereignty and not applicable when the ship is within foreign territorial waters:

"beyond what is affirmatively or tacitly permitted by the local sovereign." (123.)

It is said on page 124:

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and

correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

Again on page 129 it is said:—

"*In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. Lord v. Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176."

Berizzi Bros. Co. v. S. S. Pesaro, 271 U. S. 562 (1926).

This was an appeal from a decree in admiralty dismissing a libel *in rem* against a ship owned and operated for trade purposes by the Italian Government. The Italian ambassador to the United States appeared and protested that the ship was immune from process of the Courts of the United States because of ownership by another sovereign. The opinion applies the doctrine of the *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), involving a foreign ship of war, to Merchant ships owned by foreign sovereigns, and we emphasize the following quoted in the opinion in the *Pesaro* case from the opinion in the *Exchange* case:

"'The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, *all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circum-*

stances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"'*This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.*'" (Page 571)

* * *

"'This perfect equality and absolute independence of sovereigns, and *this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.*'" (Page 572)

Schooner Exchange v. McFaddon, 7 Cranch, 116 (1812), from which this Court quoted in its opinion in *Berizzi Bros. Company v. S. S. Pesaro, supra*, and extracts from which we have quoted, *supra*, is a case strongly relied upon by the appellant for his proposition that the United States can not exercise power extra-territorially. (B. 24.) The appellant admits, as aforesaid, that nations have extra-territorial jurisdiction of their own citizens, and the *Schooner Exchange* case, instead of being contrary to our proposition, illustrates the truth of it. The case involved a conflict of jurisdiction growing out of the very extra-territorial jurisdiction of France over its own citizens and ships, even while within our territorial limits. It holds that such extra-territorial jurisdiction of France can not be exercised in our domain without our express or tacit consent. The application of the holding to our case is that the United States has extra-territorial jurisdiction over the appellant by virtue of his citizenship, but that we can not exercise that jurisdiction in France without the express or tacit consent of France. We have shown that under the

Walsh Act no jurisdiction over the appellant was exercised in France and that the ministerial act of conveying notice to the appellant of the jurisdiction being exercised in the United States, is in accordance with the tacit consent of nations generally, and, therefore, with international law.

In the *Schooner Exchange* case, McFaddon and another filed a libel against the Schooner, then in the port of Philadelphia, alleging to be the owners of her. The Attorney General of the United States appeared, at the instance of the Secretary of State, pursuant to request by the Emperor of France through diplomatic channels, and suggested that the Schooner was an armed vessel of France and not subject to the ordinary judicial tribunals of this country. In the state of the evidence and proceedings, when the case was considered by this Court, it was assumed that the Schooner had been the property of the libelants but had been seized by the Emperor of France and placed in his armed service and had come into the port of Philadelphia on account of stress of weather. The reasoning of the opinion of this Court, as aforesaid, recognizes a conflict of jurisdiction, with the power in the United States to act as arbitrarily as it should chose, but that good faith under international law required the United States to withhold an exercise of its jurisdiction and allow the jurisdiction of France to prevail. The admission of the Schooner to our territory, in view of international law, implied our consent under the circumstances, to her withdrawal. Likewise, in view of the recognized power of a nation to recall its citizens, the admission by France of the appellant as a citizen of the United States, implied her consent that we withdraw the appellant in any way not violating the peace and integrity of France or interfering with her claims upon him or claims of her citizens against him. In other words,—

> "When private individuals of one nation spread themselves through another as business or caprice may direct, * * * it would be obviously inconvenient and dangerous to society * * * if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

But that does not negative unconflicting jurisdiction of the sovereignty of allegiance.

> "The preceding reasoning has maintained the propositions that all *exemptions* from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, *when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.*"

(The preceding quotations are from the opinion in the *Schooner Exchange* case, pages *143 and *144.

The issue in the case at bar is not whether the appellant is exempt from the jurisdiction of France, but whether we have any jurisdiction over him as a citizen of this country, and whether what is done under the Walsh Act is, in view of the nature of such cases and "the views under which the parties requiring and conceding it (sovereignty) must be supposed to act," in harmony with the implied consent of nations generally.

Schibsby v. Westenholz, et al. (Eng. 1870) L. R. 6 Q. B. 155.

The plaintiff, a Dane, residing and doing business in France, sued the defendants, Danes residing and doing business in London, England, in a French court for damages for breach of contract and recovered judgment. This was a suit in England upon the French judgment. It appeared that the French law authorized an alien resident of

France to sue a foreigner by serving summons on the "Procureur Imperial."

> "The practice (not required) of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; * * * the French consulate in London served on the defendants a copy of the citation." (157)

The opinion does not intimate any treaty existed for such manner of service or that any question was raised or doubt entertained as to the right of consuls to make such service. The court held the French judgment unenforceable in England but—

> "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them" (160).

Followed in *Rousillon v. Rousillon* (Eng. 1880) 14 Ch. D. 351, 371.

The last consular convention with France is the one of 1853, Senate Documents, Vol. 47, page 528. However Articles VIII and IX of this Convention were abrogated July 1, 1916, under notice given by the Government of the United States pursuant to the Act of Congress of March 15, 1921, generally known as the Seaman's Act. The Convention does not mention the right to use consuls to serve subpoenas or summons or the right of consuls to perform a myriad of other services to our government and its citizens. As would be expected the Convention deals only with such matters as might be considered an interference with the sovereignty of France. The great number of services performed by consuls not referred to in the convention serve to show that no treaty is considered necessary for such ministerial acts and that the tacit consent of nations to

permit our consuls to do the work is so generally recognized as to be a matter of international law.

We are advised by the present Secretary of State in a letter dated October 31, 1931, a copy of which has been furnished by us to opposing counsel that it has been the practice under Section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 601), quoted in the opinion of this Court in *Luria v. United States,* 231 U. S. 9, at pages 19-21, to serve papers upon naturalized citizens whose certificates are sought to be cancelled, through our consuls and:

"such service has occurred in many cases without, so far as I am advised, any objections having been raised by foreign governments.

"I am of the opinion that comity among nations might well require that governments should raise no objection to the service upon their soil by consular officers of foreign countries on their own nationals of processes of court issued in such foreign countries.

* * *

"The Department of State is unaware of any case in which a government has objected to service upon its territory of the nature made by consular representatives of the United States in the Blackmer case.

"I share the view of the Court of Appeals of the District of Columbia in its decision of April 6, 1931 on the Blackmer case expressed in the following words:—

" 'So here, it is no offense to the dignity or right of sovereignty of France merely to notify an American citizen residing therein that he is wanted as a witness in a court of the United States. The consul who served the subpoena was not acting in his consular or diplomatic character, but as a mere messenger of the government of the United States. The act might as well have authorized the court to designate a messenger to serve the notice.' " (49 Fed. Rep. (2d) 523-533)

Consular regulations as amended as aforesaid, in Section 480, call attention to the absence in the consular regulations of authority of consuls to serve legal process such as subpoenas, citations and complaints in connection with cases pending in federal and state courts in the United States but Section 481 calls attention to two exceptions. The old consular regulations of 1870 permitted such services by consuls and said in Section 308 thereof:

> "In such cases the consular officer does not act in his quality as an agent of the federal government but simply as a citizen of the United States whose local position and character render him available to his fellow citizens for such services as might have been rendered by a private individual." (Page 66 of "Outlines of an International Code" by David Dudley Field)

Evidently the opinion developed that performance of such services by consuls in a wholesale fashion tended—

> "to result in the loss of prestige of the officer or employee who delivers the document as well as in the prestige of the consular service generally." (Note I Section 480 of the present Consular Regulations aforesaid.)

The two exceptions authorized in Section 481 are, first, the matter of service of papers in fraudulent naturalization cases under the said Act of June 29, 1906, (U. S. C. A., Title 8, Section 405) by which consular officers are required to render assistance in such cases and regulations provide in that respect in Section 481:

> "In view of this provision of law consular officers may properly assist in the delivery to designated persons of documents forwarded to them by duly authorized officials of United States courts and in such cases delivery may be made, where deemed advisable by a member of the consular staff."

The second exception is that consuls shall serve subpoenas and orders forwarded to them under the Walsh Act.

The United States has called upon its consuls to perform as we have said a myriad of services not agreed to in treaties. We will quote from *Hyde, International Law* (1922) page 828, Section 488 and reference to the notes of the latter will show that while some such services have been merely pursuant to the directions of the Secretary of State a great many have been pursuant to Acts of Congress. Such a general practice implies that there is tacit consent among nations, which is by virtue thereof a part of the international law, that consuls may render such ministerial services without the necessity of a treaty.

Hyde on International Law (1922) page 828, Section 488:

> "There are numerous duties, the performance of which by its consular officers is required by the appointing State, and which are rarely opposed by that other within whose domain they are undertaken. Concerning many the treaties are silent and diplomatic controversy infrequent. As questions relating to performance are chiefly confined to issues between consular officers and their own governments, they possess but slight international significance.
>
> "The United States, for example, finds its consular corps a valuable ally in protecting its own institutions, such as its customs revenue, its public health and its merchant marine. Thus, there is imposed upon American consular officers the duty to certify as to the correctness of invoices of merchandise to be imported into its territory. Such officers, as well as medical officers detailed for that service by the President, are utilized also for the purpose of issuing bills of health to vessels clearing from foreign ports for ports in the United States and of informing the Government through consular reports of the sanitary condition of foreign ports. For the protection of American ship-

ping and seamen, the statutory law of the United States imposes elaborate duties upon American consular officers in relation to the shipment and discharge of seamen, the recovery of wages and damages, provisions for crews, and relief of the destitute.

"To safeguard its citizenship, American consular as well as diplomatic officers in foreign countries are required by statute to furnish the Government of the United States from time to time with the names of those naturalized citizens within their respective jurisdictions who, within five years after the issuance of certificates of citizenship, have taken permanent residence in the country of their nativity or any other foreign country; as well as the names of those American citizens who have become naturalized in conformity with the law of a foreign State or who have made oath of allegiance thereto.

"To assist in checking the emigration to the United States of persons whose admission thereto is forbidden, American consular officers are required to report all information possible which will prevent the violation of the immigration laws, as well as violations by masters of vessels bound for the United States, of its laws regulating the transportation of emigrants.

"What is deemed to be an important function of American consular officers is the gathering and compiling of useful and material information and statistics calculated to promote the development of the foreign and domestic commerce of the United States, and relating particularly to mining, manufacturing, the shipping and fishery industries, labor interests and transportation facilities.

"Principal consular officers of the United States are instructed to keep at their offices a register of all American citizens residing in their respective districts, and therefore, to make it known that a register is kept, and to invite all resident Americans to cause their names to be entered therein. Such officers are authorized to issue certificates of registration for use with

the authorities of the place where the person registered is residing, and good for use for one year only. Such certificates upon expiration are capable of renewal. Consular officers are obliged to make returns to the American embassy or legation in the country in which the consulate is situated, as well as to the Department of State, of all registrations made and of all certificates of registration issued. It should be observed that American citizens resident abroad are required to register each year.

"Upon the outbreak of The World War the Department of State directed all consular officers in Europe to advise American citizens within their districts to register, and to give duplicate certificates of registration to all persons registered who did not bear passports. In case of emergency, certificates of registration were to be issued directly from consular agencies. Attention was later called to the fact that consular registration certificates should be issued only to native and naturalized American citizens and to citizens of the insular possessions. On May 20, 1915, the Department issued notice that 'American citizens who expect to make a prolonged stay in any foreign country should apply for consular registration to the American consulate in that country at or nearest the place in which they are sojourning.' The special duties imposed upon American consular officers with respect to passports after the United States itself became a belligerent in The World War have been observed elsewhere."

1. There is no allegation or proof by the appellant that France objects to, or the laws of France forbid, service of a subpoena by messenger or by consul.

We have shown that nations may and have tacitly consented that many acts may be done within their territorial limits by foreign nations. (*Cunard S. S. Co. v. Mellon* and *Berizzi Bros. Co. v. S. S. Pesaro, supra,* pages 78-79) They are acts which are so inoffensive as not to re-

quire express consent by treaty. They have therefore become a part of international law. While a nation may withdraw such tacit consent and thus render the international law inapplicable the appellant made no allegation and offered no evidence that France had withdrawn her tacit consent and changed the applicability of international law to our relations with her.

The manner of accomplishing the service of the subpoena, being the act in question and being a ministerial and non-judicial act in itself, is such an act as only France could object to since it is an act permissible under international law. If it were considered offensive to the sovereignty of France she would have to bring the matter to the attention of the court through our Secretary of State.

The *Pesaro* case, 255 U. S. 216 (1921);
Gul Djemal, The, 264 U. S. 90 (1923);
Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F. 2d 195, (1929). Certiorari denied 280 U. S. 579.

France has neither brought the matter to the attention of the court through our Secretary of State nor directly.

It is said in *American Banana Company v. United Fruit Co.*, 213 U. S. 347 (1909) at 356:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, 126."

If it were claimed by the appellant that the law of France, as distinguished from international law, forbids a messenger or consul of the United States to perform the service required by the Walsh Act, France, being a civil law country as this Court judicially knows, such law would be a defensive fact which the appellant could not raise with-

out allegation and proof. *Gerli & Co. v. Cunard, S. S. Co.*, 48 F. 2d. 115 (2d C. C. A, 1931); American Law Institute Restatement of the Law of Conflict of Laws, Proposed Final Draft No. 2, (a continuation of Proposed Final Draft No. 1) Sections 653-656. Such a statement of attitude of law on the part of France would be exceptional and the government is under no duty to negative exceptions. *Jelke v. United States*, 255 F. 264, 279 (7th C. C. A., 1918).

I. EVEN IF THE MANNER OF SERVING THE SUBPOENA WERE CONTRARY TO INTERNATIONAL LAW OR FRENCH LAW, THE WALSH ACT WOULD NOT BE UNCONSTITUTIONAL.

Since the Congress has jurisdiction under the Constitution to provide for the recall of an absent citizen, the means adopted by the Congress to accomplish the recall are not open to question in the courts of the United States, unless such means are, in themselves, contrary to some prohibition in the Constitution. In determining whether the means adopted by the Congress violate some constitutional prohibition, the courts will look to the Constitution and not to international law or the law of France or any other foreign nation. Likewise, in determining whether such means violate due process, the Court will consider only the fact as to whether personal service of notice in ample time, and with ample means with which to comply, comports with natural justice and the law of the land. It will not consider whether such means, although comporting with natural justice and the law of the land, violate international law or the law of some other nation.

A statute prescribing the manner of accomplishing the recall may be so violative of international law and the rights of some foreign nation as to justly provoke a protest of the foreign nation through diplomatic channels. But

that is not a concern of the courts,—it is a political question to be settled by the legislative and executive departments of our government. This is but a corollary of the often repeated statement of this Court that the judiciary has nothing to do with the justice, wisdom, policy or expediency of a law.

The Constitution provides in Article VI:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

In *United States v. Siem*, 299 F. 582, (9th C. C. A. 1924), Circuit Judge Gilbert states in the opinion of the court at page 583:

> "We make no question of the power of Congress to enact that law, for neither existing treaties nor international law could divest Congress of the power, if it chose to exercise it, of requiring military service of such resident aliens, as international law is not in itself binding upon Congress, and treaties stand upon no higher plane than statutes of the United States."

In *The Over the Top*, 5 F. 2nd 838, (D. C. Conn. 1925), it is said in the opinion at page 842:

> "If we assume for the present that the national legislation has, by its terms, made the acts complained of a crime against the United States even when committed on the high seas by foreign nationals upon a ship of foreign registry, then there is no discretion vested in the federal court, once it obtains jurisdiction, to decline enforcement. International practice is law only insofar as we adopt it, and like all common or statute law, it bends to the will of the Congress. It is not the function of courts to annul legislation; it is their duty to interpret and by their judicial decrees to enforce it—and even when an act of Congress is declared invalid, it is only because the basic law is be-

ing enforced in that declaration. There is one ground only upon which a federal court may refuse to enforce an act of Congress and that is when the act is held to be unconstitutional. The act may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it. These libels, therefore, cannot be attacked upon the ground that the territorial jurisdiction of the United States cannot be extended beyond the three-mile sea zone under international law."

In *The Nereide,* 9 Cranch 388 (1815), Mr. Chief Justice Marshall said, at pages *422-*423:

"It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed,* the court is bound by the law of nations, which is a part of the law of the land."

The courts are not even at liberty to enforce the provisions of a treaty contrary to a subsequent act of Congress. If the political departments of the government see fit to modify or abrogate a treaty, although such action may constitute a breach of moral obligations, the courts have no power to prevent it or to declare the act of Congress unconstitutional. (38 *Cyc.* 974, paragraphs C and D.)

Not only would such action by the courts deny the declaration of the Constitution that it and the laws passed pursuant to it, are the supreme law of the land, but also such action would be contrary to international law itself, that each independent nation has a right to determine for itself what its laws shall be and an attempt to impose international law or the laws of any other nation would be a denial of the independence of this country.

One of the cases cited by the appellant, (B. 25) is *Bischoff v. Wethered,* 9 Wall. 812, (1869). It is cited by the appellant for his proposition that the United States has no personal jurisdiction of an absent alien. Also it is concerned with the circumstances under which a foreign judgment will be enforced in the courts of the United States. These matters are irrelevant to the cases at bar. We reserved reference to the case until this point because it supports our proposition as follows:

> "Whatever validity it (the English judgment) may have in England by virtue of statute law against property of the defendant there situate, it can have no validity here."

Grubel v. Naussauer, 210 N. Y. 149; 103 N. E. 1113 (1913) cited by the appellant, (RB. 15), also is concerned with the irrelevant problems concerning the enforcement of foreign judgments in the courts of the United States. With reference to this case, we refer to the comment in 27 *Harvard Law Review,* pages 464-6.

In presenting our answer to the appellant's point "A", we could have passed from the establishment of the conceded proposition that the United States has extra-territorial jurisdiction to legislate with respect to and to recall its absent citizens, to the proposition stated in this heading, last above, for no one will deny that, apart from international law, direct personal service of the "command" or notice of recall in any foreign nation, in ample

time and with ample means for compliance, and with an opportunity to be heard in defense before punishment for non-compliance, comports with natural justice and due process.

However, our answer has not been so limited because we believe we are supported by the great weight of authority and better reasoning in our belief that no feature of the Walsh Act violates international law. We do not think the Congress and the President of the United States, in passing and approving the Walsh Act, should be unnecessarily placed in the position of having acted contrary to international law or good faith among nations. But if there were no other alternative, the courts would, nevertheless, be constrained to sustain and enforce the Walsh Acts.

IV. ENFORCEMENT PROCEEDINGS ARE SUI GENERIS AND MAY BE QUASI IN REM AND AFFORD DUE PROCESS, (ANSWERING APPELLANT'S POINT B)

A. THE WALSH ACT DOES NOT LIMIT ENFORCEMENT TO QUASI IN REM PROCEDURE AND THESE CASES AT BAR WERE NOT ENTIRELY QUASI IN REM.

A court possesses inherent power to punish contempt of its process. That is to secure judicial authority from obstruction in the performance of its duties. The exercise of the power by inferior courts may be regulated, but not destroyed by statute. The Walsh Act first extends the jurisdiction of the court to subpoena a citizen as a witness and then extends and regulates the inherent power of the court to punish failure to respond to a subpoena.

The appellant's point "B" is: Even if the Congress could authorize the court to impose an obligation and duty upon him to respond to the subpoenas, the Congress could not authorize the Court to adjudicate a breach of such

duty upon *quasi in rem* procedure; that the Walsh Act limits enforcement to *quasi in rem* procedure; and, if the order to show cause is served abroad, it is void.

We contend that the Walsh Act does not limit enforcement to *quasi in rem* procedure and since the orders to show cause in the cases at bar were personally served upon the appellant abroad, the court had double barreled jurisdiction in these cases—(1) by the personal service, and (2), by the *quasi in rem* procedure, both authorized by the Act.

Concerning the jurisdiction pursuant to the service of the orders to show cause abroad satisfying due process, we rely upon our argument and the authorities cited in answering the appellant's point "A." We see no distinction between the power and right of the Congress to authorize the court to create the duty to respond to the subpoena and its power and right to authorize the court to adjudicate a breach of such duty upon service of notice abroad.

However, as *quasi in rem* procedure was complete in the cases at bar, and we believe valid apart from the successful effort to make personal service abroad, we do not stand on the validity of the jurisdiction pursuant to the personal service alone, but, after showing the Walsh Act does not limit enforcement to *quasi in rem* procedure, we will show that the *quasi in rem* procedure accords due process. Likewise, it seems to us, this Court may sustain the jurisdiction upon either view and not consider the other.

The Walsh Act, in section 3 (*supra*, page 4) makes it the duty of our consuls "when requested by the court or United States marshal" not only to serve subpoenas but also "to serve any orders to show cause, rules, judgments, or decrees." Then comes independent section 4 declaring the power of the court to order the subpoenaed witness

to show cause for his default. Section 5 is permissive. "Upon issuing such order the court *may* • • • direct" seizure of property to satisfy any judgment. In that event the procedure is to be as prescribed in sections 6 and 7.

To adopt the appellant's construction of the Act that sections 5 and 6 are the exclusive methods of proceeding, would be to imply that the recusant witness could avoid punishment by the simple expedient of removing his property from the United States and returning home where no consul could serve him.

B. GENERAL STATEMENT.

Punishment for failure to respond to a subpoena is to vindicate the authority of the court and is therefore "criminal contempt." The nomenclature is only to distinguish this type of contempt from "civil contempt" in which the punishment is for the benefit of a complaining private litigant. "Criminal contempt" is an "offense," subjecting the offender to punishment; but it is not a "crime." The punishment is penal, not criminal.

Both civil and "criminal" contempt proceedings are *sui generis*. "Criminal" contempt proceedings are subject to some of the incidents and requirements of a trial for an alleged crime. This is because such type of contempt is an offense and subjects the offender to a penalty and not because the offense is a "crime."

Since "criminal contempt" proceedings are fundamentally *sui generis*, no fixed formula of procedure is necessary under the Constitution. As aforesaid, the procedure may be regulated by statute. There is nothing to prevent the regulation from taking the form of provision for *quasi in rem* procedure. The appellant argues that if the procedure is *quasi in rem*, under the Walsh Act, it could not be *sui generis*, (B. 27). We can see no reason why the nature of the offense may not be *sui generis* or why the

procedure may not be *sui generis* to the extent not made *quasi in rem* by the Act. The procedure for acquiring jurisdiction may be *quasi in rem* and the incidents, so far as matters of formality are concerned, may be interpreted according to principles applicable to such *sui generis* proceedings. The Act is declaratory of inherent power of federal courts, except so far as novel procedure is expressly prescribed.

Under such *sui generis* and *quasi in rem* procedure, the offender is accorded due process, if he is clearly informed in advance of the charge which he must meet, is given a hearing before a competent court that accords with natural justice, and is given an opportunity to be represented by counsel.

The procedure prescribed by the Walsh Act meets all of the foregoing requirements:

1. It affords notice to the offending or recusant witness;

2. It provides for a hearing before a court of competent jurisdiction;

3. The hearing afforded is in accord with common law standards of natural justice;

4. The witness is not precluded from being represented by counsel or from calling witnesses.

The appellant argues that *quasi in rem* procedure, involving preliminary seizure of "non-offending property," is authorized by the Walsh Act; whereas, the "action is in fact *in personam*" for the reason that when the sentence is satisfied out of the property *in custodia legis*, the finding of guilty of contempt will still remain upon the court records as a cloud upon the citizen's good name. (B. 30-32; RB. 30-31.)

These actions against the appellant were no more *in personam* and no less against "offending property" than in previously familiar types of actions *quasi in rem*, such

as actions in state courts, pursuant to state statute, in which property of an absconding or non-resident debtor is seized to satisfy any judgment that may be rendered. In such cases, the property seized is not "offending property." In such cases, the court must first determine that the duty exists. At the trial the first question will be *in personam*, but if that question is determined in favor of the plaintiff, the determination will have no effect beyond the property attached. (See the quotation from *Cooper v. Reynolds*, 10 Wall. 308, 318, (1870) *supra*, p. 62; and see *Freeman v. Alderson*, 119 U. S. 185) (1886). In such cases the determination of the principal question, the indebtedness of the defendant, is *in personam*, and will always remain upon the records of the court as a blight upon the name of the defendant in not having paid his debts. If, under the Walsh Act, the court has no jurisdiction to render a finding of guilty of contempt that will be effective beyond the value of the property *in custodia legis*, such resulting condition is not so incongruous as to render the Act unconstitutional. So the appellant's argument that the action is in fact *in personam* with *quasi in rem* procedure is a misnomer, or, if not a misnomer, within the power of the Congress.

Finally the appellant argues—

> "Moreover, in federal courts, despite contrary legislation of Congress and contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction." (B. 32.)

If the appellant's statement had been that in federal courts, despite contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction, we would agree. But the statement of the appellant that in federal courts, despite contrary legislation of *Congress, quasi in rem* procedure is not used to acquire jurisdiction, is wrong and the opposite is held in every case he cites. We know of no

"contrary legislation of Congress" prior to the Walsh Act, but the opinions of this Court in the cases cited by the appellant include as reasoning and not as mere *dicta*, statements that Congress could provide for the use of *quasi in rem* procedure to acquire jurisdiction.

C. "CRIMINAL" CONTEMPT PROCEEDINGS ARE SUI GENERIS AND NOT TO CONVICT OF A CRIME. DUE PROCESS THEREIN IS SATISFIED UNDER THE WALSH ACT.

Since one of the premises in the argument of the appellant in support of his point "B," is that trial under the Walsh Act is for a "personal criminal offense" (B. 31; RB. 30) and "is a crime" (RB. 29), we will at the outset refer to the authorities establishing that "criminal contempt" is not a crime "within the Sixth Amendment or common understanding," but is *sui generis*. The same premise is involved in the appellant's point "E," so, to avoid repetition, we will at this place consider the authorities upon which he relies in support of that premise under his point "E" as well as under his point "B."

Criminal contempt proceedings are penal and for the punishment of an offense to such an extent that they are, in some respects, analogous to criminal proceedings. But in many other respects the proceedings are not even analogous. They are analogous to such an extent that they have been called *quasi* criminal; but this Court has very recently held, in a case involving a statute quite as regulatory as the Walsh Act, "that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis* and not criminal prosecutions within the Sixth Amendment or common understanding." (*Infra*, page 111.)

Also, very recently, this Court re-affirmed an early definition of due process in criminal contempt cases not

committed in open court, as being satisfied if the accused is advised of the charges and has a reasonable opportunity to meet them by way of defense or explanation, including the assistance of counsel and the right to call witnesses. (*Infra,* page 114.)

Being *sui generis,* contempt procedure and forms are liberal. The charges need not be in any particular form, and, apart from statute, need not be served upon the accused in any particular way, provided they are sufficient to enable him to prepare and present his defense. (*Infra,* pages 102, 105, 114.)

Gompers v. Buck's Stove and Range Company, 221 U. S. 418 (1911).

This case was decided upon *certiorari* to review the decision reported at 33 App. D. C. 516. In the case of *American Federation of Labor, et al. v. Buck's Stove and Range Company,* (33 App. D. C. 83 (1909)), the Federation and Gompers were enjoined from boycotting the Stove Company. While the defendant's appeal was pending, this proceeding in contempt for violation of the injunction was commenced in the equity case and Gompers and two others found guilty. This adjudication was appealed without incorporating the evidence in a bill of exceptions. The Stove Company moved to dismiss the appeal on the ground that it was a criminal proceeding and governed by practice applicable to law cases so that the appellate courts were bound by the findings of fact of the courts below. It is said in the opinion of this Court, at page 441:

> "Where results so controlling depend upon proper classification, it becomes necessary carefully to consider whether this was a case at law for criminal contempt, where the evidence could not be examined, for want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered."

*"Contempts are neither wholly civil or altogether criminal. * * * 'It may partake of the characteristics of both.'"*

It is said "that civil contempt is remedial for the benefit of the complainant" and "criminal contempt" "is punitive to vindicate the authority of the court." The opinion proceeded on page 444:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

This Court concluded this was a civil contempt proceeding and, since the case out of which it grew had been settled, dismissed the contempt proceedings without prejudice to the bringing of "criminal contempt" proceedings.

Criminal contempt proceedings were brought and were decided by the Court of Appeals of the District of Columbia under the caption *"Re Gompers,"* 40 App. D. C. 293, (1913). Mr. Justice Van Orsdell, in delivering the opinion of the Court of Appeals, discussed criminal contempt as follows, pages 322-323:

"In the decisions, the courts have expressed a variety of views as to the nature of the action for the punishment of contempts. Some have held it to be a criminal proceeding, in that a penalty is attached; some have held it to be in the nature of a criminal proceeding. Penalty and punishment are not alone sufficient to distinguish the proceeding as criminal. The action is sui generis, in a class by itself, partaking of some of the elements of both civil and criminal proceedings, but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court, and deemed essential to its existence. It would hardly be held that a disbarment proceeding is criminal, although a severe penalty may be imposed; or that the power of a court to reprimand its officers for miscon-

duct is a criminal proceeding, though the penalty imposed is humiliating and severe. These belong to a class of proceedings essential to the self-preservation of a court, and inherent in all courts, irrespective of their constitutional and statutory jurisdiction. *Contempt, therefore, is without any particular form of action, and not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. While Congress has the power to declare an act in contempt of court a crime, it has never exercised this power.* The power of the Federal Courts to commit and punish for contempt is inherent in the court where the contempt occurs. *Ex parte Terry,* 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77. As was said in *Watson v. Williams,* 36 Miss. 331:

> 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.'

This statement of the law is quoted with approval in *Re Debs,* 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900. It is idle to assert that the power to punish for contempt of court is inherited from the common law. The power was inherent in the courts of the United States from their creation, and exists by virtue of their creation. It is not dependent upon precedent, origin, or custom, but would exist if this power had never been exercised by the courts of England. Section 725, Rev. Stat. U. S. Comp. Stat. 1901, p. 583, *merely limits the inherent power of all courts of the United States to punish acts in contempt of their authority, and prescribes the punishment that may be inflicted. Pierce v. United States,* 37 App. D. C. 582; *Anderson v. Dunn,* 6 Wheat., 204, 5 L. ed. 242; *Ex parte Robinson,* 19 Wall., 505, 22 L. ed. 205; *Eilenbecker v. District Ct.,* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424."

Gompers v. United States, 233 U. S. 604, (1914).

The Court of Appeals having affirmed the conviction of Gompers for criminal contempt (40 App. D. C. 293, *supra*), this Court granted certiorari and reversed the judgment upon the ground that the offense was barred by the Statute of Limitations providing—

> "No person shall be prosecuted, tried, or punished for any *offense* not capital, * * * unless the indictment is found * * * within three years next after such offense shall have been committed." (607.)

It is said in the opinion:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc. to persons charged with such crimes. * * * It does not follow that contempts of the class under consideration are not crimes, *or rather, in the language of the statute, offenses,* because trial by jury * * * has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. (610-611.)
>
> "Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, *if not by Congress,* by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. *By analogy, if not by enactment, the limit is three years.* (612.)

"The result is that the judgments, based as they are mainly upon offenses that could not be taken into consideration; must be reversed." (612.)

Hudgings, Ex Parte, 249 U. S. 378 (1919).

The petitioner was punished for contempt of court because of perjury. In discharging the petitioner on habeas corpus proceedings, Chief Justice White reviewed the power of a court to punish for contempt as follows (pp. 382-384):

"That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury.

Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People,* 154 Illinois 81; *In re Rosenberg,* 90 Wisconsin 581; *Stockham v. French,* 1 Bing. 365; and see *In re Schulman,* 177 Fed. Rep. 191; *In re Steiner,* 195 Fed. Rep. 299; *In re Ulmer,* 208 Fed. Rep. 461; *United States v. Appel,* 211 Fed. Rep. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the right of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v. United States*, 247 U. S. 402; *Marshall v. Gordon*, 243 U. S. 521.

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being, true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus

it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

Myers v. United States, 264 U. S. 95 (1924).

The plaintiffs in error were fined and imprisoned for their contumacious disobedience of an injunction. The proceeding was brought under the Clayton Act of 1914; and on appeal the jurisdiction of the trial court was challenged upon the ground that the contumacious acts occurred in another division of the district. In affirming the judgment Mr. Justice McReynolds discussed contempt proceedings as follows:

(p. 103) "None of the cited Code sections makes specific reference to contempt proceedings. These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms —and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326.

"*To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt and, having prescribed limitations, leaves the court to deal with the offender.* While it gives the right to trial by jury and restricts the punishment it also clearly recognizes the distinction between 'proceeding for contempt' and 'criminal prosecution.' 'No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts.' Sec. 25.

"The Clayton Act says nothing about venue in contempt proceedings; leaves it as theretofore. The power of the court below to issue the enjoining order is not questioned. By disobeying the order, plaintiffs in error defied an authority which that tribunal was

required to vindicate. *It followed established practice, as modified by the statute;* and we think the objections to its jurisdiction are unsubstantial."

* * * * *

(pp. 104-105) "*Gompers v. United States,* 233 U. S. 604, does not support the claim that the challenged contempt proceedings amounted to prosecution for a criminal offense within the intendment of Sec. 53, Judicial Code. *While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding.*"

See also: *United States v. Zucker,* 161 U. S. 475 (1896);

Michaelson v. United States, 266 U. S. 42 (1924).

In upholding the constitutionality of those provisions of the Clayton Act which require a jury trial in certain specified kinds of contempt,—

> "if such act or thing be of such character as to constitute also a criminal offense under any statute of the United States or law of any state in which the act is committed," (Opinion, page 64)

it must be borne in mind that by virtue of the statute, "the act or thing charged must be of such character as also to constitute a crime" and then by virtue of the statute "prosecution must be in conformity with the practice in criminal cases." (Opinion, page 65.)

Mr. Justice Sutherland reviewed at length the federal decisions upholding the inherent power of courts to punish for contempts and concluded that the jury trial provisions of the Clayton Act did not abrogate or render practically inoperative that power. The following language is from the opinion (pp. 65-67):

"But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson*, 19 Wall. 505, 510-511; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it *may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character.* It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded a different and more serious question would arise. But the simple question presented is, whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. *In criminal contempts, as in criminal cases,* the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself, *Gompers v. Bucks Stove & Range Co., supra,* p. 444.

The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 *Transactions of the Royal Historical Society*, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way.' *Gompers v. United States*, 233 U. S. 604, 610-611.

This is also pointed out by counsel in the case of *O'Shea v. O'Shea and Parnell*, L. R. 15 Prob. Div. 59, 61; and, in the course of one of the opinions in that case, it is said (p. 64):

> 'The offense of the appellant (criminal contempt) is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process.'

The proceeding is not between the parties to the original suit but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way."

Grossman, Ex Parte, 267 U. S. 87 (1925).

This was an original habeas corpus proceeding to try the constitutionality of the petitioner's confinement notwithstanding a pardon granted by the President. The peti-

tioner was fined and sentenced for having disobeyed a temporary injunction issued under the Prohibition Act forbidding illicit traffic in liquors on certain premises. The President issued a pardon commuting the sentence to a fine upon condition that the fine was paid, which was done. Having been thereupon released from custody, the petitioner was again committed by the district court upon the ground that the pardon was ineffectual. In discharging the petitioner from custody the Supreme Court, speaking through Mr. Chief Justice Taft, reviewed at length the law of criminal contempts and sustained the power of the president to pardon a criminal contempt in the following language:

> (p. 111) "In our own law the same distinction clearly appears. *Gompers. v. Bucks Stove & Range Company,* 221 U. S. 418; *Doyle v. London Guarantee Company,* 204 U. S. 599, 607; *Bessette v. Conkey Co.,* 194 U. S. 324; *Alexander v. United States,* 201 U. S. 117; *Union Tool Co. v. Wilson,* 259 U. S. 107, 109.
>
> In the *Gompers* case this Court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions. * * *
>
> (pp. 115-116) Nothing in the ordinary meaning of the words 'offenses against the United States' excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (*In re Neagle,* 135 U. S. 1, 59, *et seq.*), and so must be an offense against the United States. Moreover, this Court has held that the general statute of limitation which forbids prosecutions 'for any offense unless instituted within three

years next after such offense shall have been committed,' applies to criminal contempts. *Gompers v. United States*, 233 U. S. 604. In that case this Court said (p. 610): (See *supra*, p. 103.)

(pp. 117-118) The argument is that the word 'offenses' is used in the Constitution interchangeably with crimes and criminal prosecutions. But as has been pointed out in *Shick v. United States*, 195 U. S. 65, the term 'offenses' is used in the Constitution in a more comprehensive sense than are the terms 'crimes' and 'criminal prosecutions.'

In *Myers v. United States*, 264 U. S. 95, 104, 105, *we have but recently held that 'while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our Government proceedings to punish such offenses have been regarded as sui generis and not criminal prosecutions within the Sixth Amendment or common understanding.' Bessette v. Conkey Co.*, 194 U. S. 324, 326. Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts have held to be inherently empowered to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the Fifth and Sixth Amendments and of other cited parts of the Constitution are not of significance in determining the scope of pardons of 'offenses against the United States' in Article II, Section 2, clause 1, of the enumerated powers of the President. We think the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing."

Cooke v. United States, 267 U. S. 517 (1925).

Cooke was sentenced to thirty days' imprisonment for contempt in writing a highly libellous letter to a United States Judge on the day following a trial in which a verdict had been rendered against his client. The court and Judge were at that time engaged in another trial. Eleven days later, the court issued an order for the attachment of Cooke, who was arrested and brought before the court. Upon admitting the authorship of the letter, the court pronounced him guilty of contempt and forthwith sentenced him, as above, without allowing Cooke to secure and consult counsel, prepare his defense and call witnesses or to make a personal explanation.

Upon appeal, the Supreme Court reversed the judgment and remanded the case for a further hearing. Chief Justice Taft stated in the opinion (pp. 534-535):

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry*, 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.
>
> The important distinction between the *Terry* case and the one at bar is that this contempt was not in

open court. This is fully brought out in *Savin, Petitioner*, 131 U. S. 267. The contempt there was an effort to deter a witness, in attendance upon a court of the United States in obedience to a subpoena, while he was in a waiting room for witnesses near the court room, from testifying, and the offering him money in the hallway of the courthouse as an inducement. This was held to be 'misbehavior in the presence of the Court' under Sec. 725 R. S. (now Sec. 268 of the Judicial Code). The Court, speaking by Mr. Justice Harlan, said (page 277):

We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry*, 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286." • • •

(pp. 536-537):

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not important. The Court in *Randall v. Brigham*, 7 Wall., 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

'All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.'

The Court in *Savin, Petitioner,* 131 U. S. 267, applied this rule to proceedings for contempt:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See *Hollingsworth v. Duane,* 12 Fed. Cases 359, 360; *In re Stewart,* 118 La. 827; *Ex parte Clark,* 208 Mo. 121."

Schwartz v. United States, 217 Fed. 866 (C. C. A. 4th Cir., 1914).

In affirming a conviction for criminal contempt in violating a strike injunction (the proceeding having commenced with a rule to show cause), Circuit Judge Woods held (p. 868):

"But, aside from that, the original petition and affidavits, as we have pointed out, contained distinct and definite charges against him, and the order suspending his trial on these charges did not affect his liability to answer them. Under that order making the United States a party, transferring the cause to the criminal docket, and directing the original petition and affidavits to be filed in the criminal proceeding, the charges and specifications contained in the original papers stand against the defendant as the basis of the

criminal proceedings. *There is no fixed formula for contempt proceedings, and technical accuracy is not required. It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged; and this is to be determined by examination of the entire record. Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Acron v. United States*, 155 Fed. 833, 84 C. C. A. 67; *United States v. Huff* (D. C.), 206 Fed. 700.''

Armstrong, et al. v. United States, 18 Fed. (2nd) 371 (C. C. A. 7th Cir., 1927).

Contempt proceedings were here brought against the defendants for violating a strike injunction. The sufficiency of the information was attacked for duplicity and indefiniteness. In sustaining the conviction, Circuit Judge Anderson held (pp. 372-373):

"(2) (a) The contention that the information is bad for duplicity is without merit. As stated by the Supreme Court in *Myers v. United States*, 264 U. S. 95, 44 S. Ct. 272, 68 L. Ed. 577, *contempt proceedings 'are sui generis—neither civil actions nor prosecutions for offenses,* within the ordinary meaning of those terms.' The cases cited by plaintiffs in error in support of this contention deal with indictments in criminal cases and are not in point. *'There is no fixed formula for contempt proceedings, and technical accuracy is not required.' Schwartz v. U. S.* (C. C. A.) 217 F. 866; *Scoric v. U. S.* (C. C. A.) 217 F. 871.

(3) Upon the question as to the sufficiency of the information, it is enough to say that there was filed with it, and attached to and made a part of it by proper averments, the injunction order of the court and the affidavits of three persons setting forth facts constituting violations of the order. In the information thus considered there is set forth the injunction and the acts constituting its violation. The acts charged amount to

clear violations of the injunction. In apt words it is averred that the plaintiffs in error conspired to do, and did, things which the injunction prohibited; that they conspired to commit, and committed, acts which it forbade. The information charged that plaintiffs in error willfully disobeyed an injunction lawfully issued in an equity cause then pending. It was sufficient, and the motion to quash was properly overruled."

We also cite:

Merchants Stock & Grain Co. v. Board of Trade, 201 F. 20, (8th C. C. A., 1912);

Hansen v. United States, 1 F. 2d, 316 (7th C. C. A., 1924);

Bowles v. United States, 50 F. 2d, 848, 852 (4th C. C. A., 1931);

Debs, In re, 158 U. S. 564, 594 (1895).

The mere fact that the type of contempt involved in the cases at bar has come to be commonly known as "criminal contempt," does not change the essential or legal nature of the offense or the proceedings, except in so far as, for reasons of policy, the courts have chosen to rely, in some respects, upon the analogy of criminal proceedings.

United States v. La Franca, 282 U. S. 568 (1931).

This was an action to recover "taxes" based upon illegal sales of liquor in violation of the National Prohibition Act. The applicability and interpretation of the Willis-Campbell Act was involved and it was contended that the so-called "taxes" were "penalties." It is said in the opinion:

"No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true

tax, but a penalty involving the idea of punishment for infraction of the law, is settled * * *." (572)

Huntington v. Attrill, 146 U. S. 657 (1892).

On error to Maryland state court the judgment dismissing a suit in equity was reversed. The bill was by Huntington to set aside a transfer of stock as in fraud of creditors and to charge the stock with payment of a judgment against Attrill upon his statutory liability as a director of a New York corporation. Huntington had recovered the judgment in New York state courts upon the ground that Attrill had sworn falsely that the capital of the corporation was fully paid. It was argued that the judgment was for a penalty and that Maryland courts should lend their aid to enforcement of penalty statutes of New York. The Supreme Court held that whether a law is "penal" in the international sense "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." In that sense this proceeding is "penal" but still it is not a "crime." And we are not asking any other nation to enforce a "penal" law of the United States.

The "essential nature" of punishment for contempt is penal, not criminal.

The foregoing cases clearly establish that the courts of the United States enjoy the inherent right and power to punish for contempt; that procedure may be regulated by the Congress; that "criminal contempt" proceedings are *sui generis* and not for the punishment of a "crime"; that the Walsh Act is declaratory except as it extends the jurisdiction of the court and regulates procedure; that established principles of jurisdiction and practice may prevail except as modified by the Act, and that except as modified by the Act, no fixed formula of procedure is necessary. It is sufficient that the procedure, as regulated by the Act,

does not deny due process. There is nothing in the nature of the offense which precludes the use of *quasi in rem* procedure.

D. THE CONGRESS MAY AUTHORIZE FEDERAL COURTS TO USE QUASI IN REM PROCEDURE TO ACQUIRE JURISDICTION.

In so far as the appellant's argument, in support of his point "B," is based upon his theory that courts of the United States can not acquire jurisdiction pursuant to extra-territorial service of process, we rely upon our answer to his Point "A." We are now addressing ourselves to his contention that the Congress can not authorize *quasi in rem* procedure, which, of course, involves an adjudication of a personal obligation.

The appellant correctly states (RB. 26), that the Walsh Act, in its *quasi in rem* procedure, does not mandatorily require successful personal service upon the accused, of the citation to show cause, as a condition precedent to trial and adjudication. It does require an effort to obtain such personal service, but it was undoubtedly recognized that the accused might hide so that personal service of the citation could not be made. Therefore, all that the Act mandatorily requires in the *quasi in rem* procedure, prior to trial and adjudication, is seizure of property and service of citation by publication. (Sections 5 and 6 of the Act.)

The cases cited by the appellant show that attempts have been made in the federal courts to sustain jurisdiction acquired by the *quasi in rem* procedure of attachment, based upon two types of acts of Congress, in which cases the jurisdiction was denied, not because Congress could not confer jurisdiction acquired in such manner, the court expressly reasoning that Congress could, but for the reason that the statutes relied upon were interpreted as not intending to confer jurisdiction acquired in such manner.

The first Act of Congress, which has been relied upon, is the Conformity Act. *Toland v. Sprague*, 12 Pet. 300, (1838) (B. 32), holds that the adoption of state forms and practice does not mean adoption of state means of acquiring jurisdiction, and, as aforesaid, reasons that such means of acquiring jurisdiction would have to be pursuant to legislation of Congress for that purpose. (*Supra*, page 67.)

Laborde v. Ubarri, 214 U. S. 173 (1909) (B. 32), holds that in federal courts, attachment is but an incident and not a means of acquiring jurisdiction, obviously because of an absence of necessary legislation by Congress. The distinction between conformity to state practice, pleadings, forms and modes of proceeding and jurisdiction is well brought out in *Western Loan & Savings Company v. Butte Mining Company*, 210 U. S. 368 (1908), and *McNeal-Edwards Company v. Young Company*, 42 F. 2d, 362, 367 (1930), reversed 283 U. S. 398 (1931 preliminary print).

The second Act of Congress which has been relied upon, is the Act of March 3, 1887 (24 Stat. 552, c. 373, as amended August 13, 1888, 25 Stat. 433, c. 866). This was in the *Big Vein Coal Company v. Read*, 229 U. S. 31 (1912) (B. 32). This Court held the statute of 1888 was not properly interpretable as changing the rule, but said, page 38:

> "If Congress had intended any such radical change, *it would have been easy to have made provision for that purpose and doubtless a method of service by publication in such cases would have been provided.*"

E. SERVICE BY PUBLICATION IN ACTIONS QUASI IN REM IS SUFFICIENT FOR DUE PROCESS.

The appellant argues that under Sections 5, 6 and 7 of the Walsh Act, publication of the order to show cause, after seizure of property of the defaulting witness, is all that is mandatory. Section 6 of the Act requires an effort to make personal service of the order to show cause, but

does not require that such effort be successful before trial can be had. In these cases, personal service was had upon the appellant. But appellant argues that there may be a case in which trial is had pursuant to attachment and service by publication only and that such a case would not be in accordance with due process for want of sufficient or any legal notice to the accused.

Passing over the right of the appellant to raise the question in this case, in view of the personal service which was had upon him, we submit that service by publication, pursuant to attachment, is sufficient in actions *quasi in rem* to satisfy due process.

Undoubtedly most of the states have statutes authorizing suits against non-residents by "foreign attachment." All such statutes provide for service by publication and some, in addition, provide for an effort to give personal notice, either by mail or service outside of the state. When there is a sufficient statute, courts have jurisdiction to determine a personal obligation and enforce the adjudication to the extent of property previously seized and service by publication only is enough to afford due process.

Central Loan & Trust Company vs. Campbell Commission Company, 173 U. S. 84 (1898), Opinion by Mr. Justice White.

The Trust Company, a Texas corporation, sued the Commission Company, a Missouri corporation, in an Oklahoma territorial court upon promissory notes not then due. Attachment issued, property was seized and notice was published as authorized by territorial statute. It was held:

(Syl.) "4. That the court acquired jurisdiction of the defendant corporation by constructive service, by foreign attachment, without its consent;"

and that the statute afforded due process. It is said in the opinion, page 97:

"II. It is insisted that 'under the organic act of the Territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent.'

The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.* It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found."

Security Savings Bank v. California, 263 U. S. 282 (1923).

In the opinion of the court by Mr. Justice Brandeis, page 287, it is said:

"But whether the proceeding should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard."

Missouri v. North, 271 U. S. 40 (1926).

In the opinion by Mr. Justice Stone, page 42, it is said:

"The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Many other cases might be cited which recognize that under such proceedings determination of a personal obligation is valid to the extent of subject matter within the control of the court. Among them are:

Bischoff v. Wethered, 9 Wall. 812 (1869);
Cooper v. Reynolds, 10 Wall. 308 (1870);
Harkness v. Hyde, 98 U. S. 476 (1878);
Pennoyer vs. Neff, 95 U. S. 714 (1877);
Arndt v. Griggs, 134 U. S. 316 (1890);
Hamilton v. Brown, 161 U. S. 256 (1895);
Roller v. Holly, 176 U. S. 398 (1899);
Leigh v. Green, 193 U. S. 79 (1903);
Ballard v. Hunter, 204 U. S. 241 (1906);
Blinn v. Nelson, 222 U. S. 1 (1911);
Jacob v. Roberts, 223 U. S. 261 (1911);
Miedreich v. Lauenstein, 232 U. S. 236 (1914);
Grannis v. Ordean, 234 U. S. 385 (1913).

V. SERVICE OF THE "ORDER TO SHOW CAUSE" IS SUFFICIENT NOTICE OF THE OFFENCE TO AFFORD DUE PROCESS. (ANSWERING APPELLANT'S POINT C.)

The appellant's point C is (B. 34)—

> "The Act does not require actual or any other notice to defendant of the offense or of the government's claim against his property, and hence violates due process * * *."

The appellant has separate procedural points, H-b and H-c, to the effect that even if the Act does require sufficient notice to satisfy due process, that he did not get such notice in these cases. We will deal here only with the attack upon the Walsh Act.

The argument of the appellant is that the Act only requires service by publication, or personally, of an order to

show cause, which may not recite the facts surrounding the offense. (B. 34, RB. 32.)

The Act provides (Sec. 4) that, if the witness fails to appear, the court shall, upon proper showing, "issue an *order* directing the witness to appear before the court at a time in such order designated *to show cause why he should not be adjudged guilty of contempt* and be punished accordingly." Sec. 5. "Upon issuing such order the court may * * * direct *as a part of such order* that the property of the recusing witness * * * shall be levied upon and seized * * * to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." Sec. 6. "The marshal * * * shall * * * forward to the consul * * * a copy of the order to show cause * * * with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness * * *." Sec. 3 makes it the "*duty*" of the consul to try to make such service upon such "request."

Therefore, the order to show cause which will be published and, if reasonably possible, served personally upon the witness will notify him of:

(1) the court where he will have a hearing;

(2) the time of such hearing;

(3) the object of the hearing;

(4) the seizure of property; and

(5) the object of the seizure.

Such notice fulfills all the essentials of due process as defined by the Supreme Court in the foregoing cases in contempt and *quasi in rem*.

The appellant argues that the Act instead of simply requiring notice of the object of the hearing, to-wit: that it

is for the purpose of giving the defaulting witness an opportunity to show cause why he should not be adjudged in contempt of court, should lay down in detail the contents of an order to show cause, including specification of the facts ordinarily embodied in the motion, petition or affidavit of information leading up to the order to show cause, or that it should require a copy of such motion, petition or affidavit of information to be served along with the order to show cause.

The appellant calls attention to that part of the Clayton Act in U. S. C. A., Tit. 28, Sec. 387, which requires that in proceedings under that Act, a copy of the affidavit of information shall accompany the order to show cause. The mere fact that such procedure is required in one statute is no reason that it must be required in all statutes. On the contrary, the fact that it has been expressly required in proceedings under the Clayton Act leads to the inference that it is not necessary, apart from statutory requirement, that such details accompany the order to show cause.

The case of *In re Rosser*, 101 Fed. 562 (C. C. A. 8th Cir., 1900), cited by the appellant (B. 34) concerned a section of the bankruptcy act which provided in general terms for an order to appear for examination concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration. The language of the Act is just as general as it is in the Act of July 3, 1926 with respect to the contents of the order to show cause. Nevertheless, the court did not hold the Act unconstitutional as not requiring particularity as to the subject matter to be investigated. The court merely held that the order which was issued was in fact and law insufficient. In other words, the order did not comply with the implied requirements of the Act. This is appellant's point H-c, and as stated aforesaid will be considered hereinafter.

The case of *Coe vs. Armour Fert. Wks.*, 237 U. S. 413, (1915) cited by the appellant (B. 35) concerned a Florida statute which permitted judgment against a stockholder of a corporation upon an unsatisfied judgment against the corporation to the extent of the stockholder's unpaid stock subscription without providing for any statement of claim, notice thereof or hearing thereon. Obviously such a statute does not afford the stockholder due process. The Act of July 3, 1926 does provide for a hearing after notice of the charge before judgment. The appellant in quoting from the opinion in the *Coe* case (in his brief in the Court of Appeals) carefully omitted the paragraph which shows the inapplicability of the decision in that case to the cases at bar. It is said in the opinion, at page 425:

> "The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such is not its normal function or effect, no 'day in court' is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise. *Windsor v. McVeigh*, 93 U. S. 274, 279, *et seq.*, *Grannis v. Ordean*, 234 U. S. 385, 393."

In other words, if the Florida statute had provided for a hearing after notice of the claim at which the stockholder could show cause why judgment should not be rendered against him, the statute would not have been open to the objection that was sustained. Consequently, since the Act of July 3, 1926 does make such provision it is not open to objection.

When an Act of Congress specifies that a particular thing shall be done, such as an order to show cause why a defaulting witness shall not be adjudged in contempt, the

Congress need not specify the details of the order. It is entitled to assume that the order will contain all the particulars essential to comply with the Constitution and other laws not inconsistent with the statute.

> "It is elementary that what is implied in a statute is as much a part of it as what is expressed. * * * It is also elementary that, when a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." (*Dooley v. Pennsylvania Rd.*, 250 F. 142, 143, 1918.)

> "A statute will not be held unconstitutional or void because of mere omission of details necessary to accomplish its evident purpose, for such details can be supplied by reasonable implication." (*State v. Kansas City*, 310 Mo. 542; 276 S. W. 389, 397.)

We also cite:

Durousseau v. United States, 6 Cranch 307, 314, (1810);

County of Wilson v. National Bank, 103 U. S. 770, 778 (1880);

The Paquette Habana, 175 U. S. 677 (1900);

People ex rel. v. Eddy, 57 Barb. 593, 598, (1870).

In view of the foregoing principles of law, it would seem unnecessary to note the specific grounds upon which the appellant asserts the order to show cause, required by the Act, will be indefinite. Therefore, we will only very briefly touch upon them.

One contention is that the Act does not require either the subpoenas or the orders to show cause to include notice that they are served under the authority of the Walsh Act, (B. 35, RB. 32), "in the absence of which he is entitled to assume that it is a general subpoena issued under general law, and because served 'beyond the jurisdiction of the United States,' is void." (RB. 32.)

In the court below the appellant relied upon the Canadian case of *Darling, In re,* 39 Upper Canada, Q. B. Rep., 339 (1876). The statutes of Canada, involved in that case, require that the subpoena bear notice of the Act under which issued. There is nothing in the Walsh Act that requires such a note on the subpoena or on the order to show cause and no reason under our Constitution or any other statute for including such notice. Even an indictment need not have a note on it of the statute under which it is brought. *Leonard v. United States,* 18 F. 2d, 208, 212, (6th C. C. A. 1927).

A citizen is constructively charged with notice and knowledge of the statutes and laws of the land, so that contrary to the assertions of the appellant, quoted above, we submit that a citizen subpoenaed from abroad by personal service of an ordinary subpoena, is bound by the subpoena, if there were any law authorizing such procedure, and that he is not entitled to assume that it was an invalid subpoena merely because without a proper statute it would be invalid.

The next ground of attack is that the order to show cause may not identify which of several contempts is referred to.

If the accused complies with the order to show cause, there can be no doubt that before trial he will know, in all necessary detail, which of his many contempts is referred to. As the contempt cases we have cited say—all that is necessary to due process is that in ample time to prepare a defense, the accused be advised in some form of the charges against him. If the order to show cause leaves him in doubt, he may apply for a bill of particulars. (*Bowles v. United States,* 50 F. 2d, 848, 852, (4th C. C. A. 1931) quoted *infra,* pp. 162-163).

In *Durland v. United States*, 161 U. S. 306 (1896), it is said in the opinion of this Court, page 315:

> "If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. *Rosen v. United States*, 161 U. S. 29."

We also cite:

Lewis v. United States, 295 F. 441, 443 (1924), (certiorari denied, 265 U. S. 594);

Leverkuhn v. United States, 297 F. 590, 593, (5th C. C. A., 1924);

Case v. United States, 6 F. 2d, 530, 9th C. C. A., 1925); and

Wilson v. United States, 275 F. 307, 310, 311 (1921), (certiorari denied 42 S. Ct. 57) in which many decisions of this Court are collected.

The same principles that we have outlined above, dispose of the appellant's contention, (B. 34; RB. 32, 33), that the Act does not require the order to show cause to specify the claim against the property that is seized, or to identify the property that has been seized. On this contention, in addition to what has already been said, we call attention to the principle of law that the owners of property seized by the processes of court, are presumed to be found with the property. (*Central Loan & Trust Company v. Campbell Commission Company*, 173 U. S. 84, (*supra*, page 120). The court need not concern itself with such an unusual property owner as will not know what property has been seized, or why it has been seized, within a very short time after the seizure. Perhaps the appellant is so rich that he can lose $100,000 of property without missing it, but the Act does not and need not contemplate such indifference.

Contrary to the assertions of the appellant, (B. 34, 35) that special counsel for the government in these cases, by the form and conditions of the orders to show cause involved in the cases at bar, interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claim against the property, we assert that the only proper inference from the form and conditions of the orders to show cause involved herein, is that special counsel for the government construed them as giving the appellant all necessary notice. Whether the orders to show cause did in fact give all necessary notice, or whether the appellant obtained all necessary notice in any other way, will be discussed in answer to appellant's points H-b and H-c, as aforesaid. Suffice it to say that we are in hearty accord with the appellant's argument that he was entitled to notice of the charges and so there is no need to consider the authorities he cites to sustain that proposition. We respectfully submit that the Act requires and accords all notice necessary to satisfy due process.

VI. NO UNREASONABLE SEARCH AND SEIZURE, IN VIOLATION OF THE FOURTH AMENDMENT, IS AUTHORIZED BY THE ACT. (ANSWERING APPELLANT'S POINT D)

It is significant that the appellant has no point that there was any search whatever for the property seized in the cases at bar, to say nothing of there having been any unreasonable search and seizure. His only point is that Congress intended in the Walsh Act that there would be an unreasonable search and seizure and that therefore the Act is unconstitutional. Merely to state the contention is to show its error.

As early as 1781 this Court said all that is necessary to dispose of this point. In *The Resolution,* 2 Dallas, 1, the court was considering an Act of Congress relative to

vessels captured as prizes, and said in the opinion, pages *3 and *4:

> "But it is alleged, that 'the late ordinance of congress is express and decided, that after a capture and occupation for twenty-four hours, the property captured shall be prize'. The ordinance of congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the terms and spirit or intention of it. Prize is generally used as a technical term, to express a legal capture; and congress having adopted it, in framing of the ordinance, the general sense or acceptance of it must determine its import and signification."

The appellant argues that the amount of property to be seized is in the uncontrolled discretion of the court and that there is no way for the marshal to find the property except to search for it and there is no limitation upon the place of search. (B. 36.) It is well settled that a statute is not to be declared unconstitutional because of anticipated improper or invalid actions or abuse of discretion in the administration of the statute.

Smith v. Cahoon, 283 U. S. 553, 562, (1931 preliminary print), 51 S. Ct. 582, 585;
Gundling v. Chicago, 177 U. S. 183, 186, (1900);
Lehon v. Atlanta, 242 U. S. 53, 55, 56, (1916);
Hall v. Geiger-Jones, 242 U. S. 539, 553 (1917).

This Court said in *Go-Bart Importing Company v. United States*, 282 U. S. 344, (1931) at page 357 of the opinion:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

Since the appellant does not claim that the search and seizure in the cases at bar was unreasonable, we believe this Court need not anticipate improper administration or exer-

cise of discretion under the Walsh Act but may wait until a case is presented in which there is a claim of unreasonable search and seizure and decide it "upon its own facts and circumstances."

That construction of a statute will be given, if possible, that will sustain the constitutionality of the enactment. It will be presumed that the procedure generally prescribed will be administered in conformity with constitutional law so that if the marshal has any doubt as to where to go for the amount of property ordered seized, he may require such affidavits and directions as are customary in attachment cases and in levies and sales upon execution.

We are again met by the assertion that these contempt proceedings are criminal actions; that "non-offending" property is seized while the presumption of innocence obtains, without any prior notice or hearing and in the absence of personal jurisdiction over the accused. We have already shown the error in most of these assertions. In so far as the argument is that property may not be seized while the presumption of innocence obtains and in advance of hearing, we refer to the familiar procedure in foreign attachment cases.

The Fourth Amendment must be interpreted in conjunction with the clause in the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. Before there can be an unreasonable search and seizure, it must appear that the ultimate object is the procurement of incriminating evidence—

Boyd v. United States, 116 U. S. 616, 622, 624, 626, 630, 633, 634, (1885);

Weeks v. United States, 232 U. S. 383, (1913);

Gouled v. United States, 255 U. S. 298, (1921);

and we do not believe that *Go-Bart Importing Company v. United States, supra,* holds to the contrary for it involved

what was held to be an unreasonable search and seizure for incriminating papers kept in a safe belonging to the accused.

It will be remembered that in the case of *Bartue and Duchess of Suffolk*, and in the case of *Knowles v. Luce*, *supra*, page 43, it is held that at common law the sovereign has the right to forfeit all the property of a subject or citizen who is abroad and refuses to return pursuant to request of the sovereign. So the Walsh Act, in authorizing the court to direct seizure of property belonging to a recusant citizen of the United States, and to fix the amount that shall be seized, is not reasonable.

VII. HOLDING THE HEARING AND PRONOUNCING JUDGMENT IN THE ABSENCE OF APPELLANT DID NOT VIOLATE DUE PROCESS. (ANSWERING APPELLANT'S POINT E)

The Walsh Act gives the recusant witness an opportunity to be personally present at his hearing and at the time judgment is announced. It does not require his presence.

The entire argument of the appellant upon this point is predicated upon what has hereinbefore been shown to be erroneous premises—first, that "criminal" contempt is a crime, a misdemeanor or a felony, and, second, that *quasi in rem* procedure can not be used in contempt cases. There is no need to repeat our argument upon those propositions. For that reason we need not comment upon the misdemeanor cases cited by the appellant; (*United States v. Mayo*, Federal Case No. 15754, 26 F. C. 1230 (1853); *United States v. Shelton*, 6 F. 2d, 897 (1925), and *Lewis v. United States*, 146 U. S. 370 (1892)). (B. 38; RB. 39, 40.)

Of course, in the cases at bar, in view of the personal service had upon the appellant he is not entitled to raise the question of the validity of proceeding upon attachment

and service by publication only. But we submit that even such proceedings, when duly authorized by statute, are within the jurisdiction of the court and do not violate due process.

We interpret *Terry, Ex Parte,* 128 U. S. 289, (1888), cited by the appellant, (B. 37; RB. 40) as holding exactly the contrary to his position. In that case this Court held that one who commits a direct contempt in the face of the court, but who leaves the courtroom before punishment therefor, may, in his absence, be sentenced for the contempt. If contempt were a crime that could not be done. The only difference between such form of contempt and the form involved in the cases at bar, is that in this type of contempt the accused must have notice of the charges and "an opportunity, before sending him to jail, to answer the charge of having committed a contempt." (*Terry* case, page 311.)

The appellant emphasizes the language of the opinion in that case, pages 311-312:

> "Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence."

We believe, in view of the issues of that case and the context, that the statement refers to the necessity of notice prior to trial in order to constitute jurisdiction from the standpoint of due process. There is no need to repeat here that in these cases the appellant had such notice, both personally and by seizure of his property and by publication.

In *Merchants Stock & Grain Company v. Board of Trade,* 201 F. 20 (8th C. C. A. 1912), the court considered criminal contempt charges, the contempt not having been

in the presence of the court; and said at page 27 of the opinion:

> "*Fifth.* For a criminal actual contempt the defendant may without a waiver and without his consent be sentenced in his absence. *Ex parte Terry,* 128 U. S., 289 *-* *; *Middlebrook v. State,* 43 Conn., 257, * * *."

Mr. Justice Van Orsdel quoted the above language with approval in his opinion for this Court in *Re Gompers,* 40 App. D. C., 293 (1913), and also says, (page 328):

> "*Error is urged in the appointment of a United States Commissioner for the purpose of taking testimony in this cause. The custom of taking testimony by deposition, affidavit, or interrogatories in contempt cases is ancient.* 1 *Newland's Ch. Pr.* 392. *The practice has prevailed generally in this country. Rapalje, Contempt,* 124; *Fletcher, Eq. Pl. & Pr.* sec. 553; *Una v. Dodd,* 38 N. J. Eq. 460. It was the method adopted by the Supreme Court in the recent case of *United States v. Shipp,* 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265, 214 U. S. 386, 53 L. ed. 1041, 29 Sup. Ct. Rep. 637. See also *Re Savin,* 131 U. S. 267, 278, 33 L. ed. 150, 153, 9 Sup. Ct. Rep. 699; *Re Chiles* (*Texas v. White*), 22 Wall. 157, 22 L. ed. 819. *The question, however, does not arise in this case, since all testimony was taken in open court.*"

While some of the safeguards thrown about punishment for a crime, have, by analogy, been held elements of due process in criminal contempt cases, there are many more respects in which the contempt proceedings may differ from criminal prosecutions—first, criminal contempts are tried summarily; second, no formal indictment is necessary; third, testimony may be taken in the absence of the accused by deposition, affidavit or interrogatories; fourth, courts having no criminal jurisdiction, (courts of chancery and other courts) can punish for so-called criminal contempt; fifth, there is no right of trial by jury; sixth, no

change of venue can be allowed—contempt must be tried by the court offended; seventh, even if the contemptuous act were also a crime, punishment for the contempt will not bar punishment for the crime—the principles of double jeopardy are not applicable; and eighth, as aforesaid, the accused may, without a waiver and without his consent, be tried and sentenced in his absence, provided in cases of contempts not committed in the presence of the court, he should have notice of the charges and an opportunity to present his defense.

These propositions are established by the authorities we have cited immediately above, and also at pages 100 to 117 of this brief.

It does not seem to us that this Court would have used the expression in *Cooke v. United States, supra,* page 114,

> "* * * the accused (in a prosecution for contempt not committed in open court) should be advised of the charges and have a reasonable *opportunity* to meet them by way of defense or explanation"

if it were necessary that the accused be brought and held at the bar of the court. Instead of saying that the accused should have reasonable "*opportunity*" to meet the charges, the court would have said that he have such opportunity and be brought and held in custody as a criminal. Punishment for contempt, not being a crime "within the Sixth Amendment or common understanding" is subject to regulation by the Congress as in the Walsh Act as to whether the accused may be tried and sentenced in his absence.

VIII. THE ACT DOES NOT VIOLATE THE RIGHT OF AN ACCUSED TO COMPULSORY PROCESS FOR OBTAINING WITNESSES GUARANTEED BY THE SIXTH AMENDMENT. (ANSWERING APPELLANT'S POINT F)

A. THE APPELLANT IS NOT ENTITLED TO RAISE THE POINT.

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor, * * *."

To make the appellant's argument concrete, instead of an abstract attack upon the Walsh Act, it is that Sinclair and Fall in the criminal conspiracy case for which appellant was subpoenaed, could not have subpoenaed the appellant or any other witness from abroad; that therefore the Act is contrary to the foregoing provision of the Sixth Amendment and that the appellant thus owed no duty to respond to the subpoenas, and can be guilty of no contempt in not obeying them.

In connection with the argument of the appellant in the trial court in support of his motion to vacate the proceedings, he expressly disclaimed any contention that he himself in the hearing on the contempt charges, does not have all constitutional rights for obtaining witnesses in his favor. (Supreme Court of the District of Columbia, *United States v. Blackmer,* Contempt No. 16—"Reply Brief for Respondent in Support of Motion to Vacate Proceedings," page 2). In other words—

> "The only question in this regard is whether the defendants in the case of *United States v. Sinclair and Fall* have that constitutional right; * * *" (same brief of appellant, page 2).

It is therefore clear the appellant seeks to avoid the consequences of his recusancy because he asserts a constitutional right of third parties is violated. The argument is upon the assumption that if the Act gave or gives the accused, in the case for which the witness is subpoenaed, the same and equal right with the government, then the appellant would be guilty, but otherwise not.

Jeffrey Manufacturing Company v. Blagg, 235 U. S. 571, (1915).

In this case, the constitutionality of the Workmen's Compensation Law of Ohio was challenged as to the single feature taking away the defense of contributory negligence from establishments employing five or more and permitting such defense to those concerns which employ less than five. The argument was based upon supposed wrongs to the employee, but no employee was complaining in the action of such injustice so it was said in the opinion of the Court, page 576:

> "The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality *in the feature complained of. Southern Railway v. King,* 217 U. S. 524, 534; *Engel v. O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright,* 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal v. New York,* 226 U. S. 260, 271; *Darnell v. Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry. v. Cade,* 233 U. S. 642, 648."

The same principle is applied in *Roberts & Schaefer Company v. Emmerson,* 271 U. S. 50 (1926), opinion by Mr. Justice Stone, pages 54, 55; *Gorieb v. Fox,* 274 U. S.

603 (1927); opinion by Mr. Justice Sutherland, page 606; *Aetna Insurance Company v. Hyde*, 275 U. S. 440 (1928), opinion by Mr. Justice Butler, pages 446, 447.

Blair vs. United States, 250 U. S. 273 (1919).

Plaintiffs in error were adjudged guilty of contempt of court because of their refusal to obey a court order directing them to answer certain questions asked of them before a federal grand jury and committing them to the custody of the marshal until they should so comply. Upon their refusal to answer the questions propounded, the grand jury made a written presentment of such facts to the District Court with a prayer that they might be dealt with as contumacious witnesses. In opposition to the petition of the grand jury, counsel for the witnesses contended that the Corrupt Practices Act of June 25, 1910 (36 Stat. 822), was unconstitutional and void and hence the grand jury lacked authority to investigate supposed violations of that Act. At the conclusion of the hearing the court directed the witnesses to answer the question propounded; and upon their refusal so to do, they were subsequently adjudged guilty of contempt. In affirming the judgment, Mr. Justice Pitney of the Supreme Court stated (pp. 281-283):

> "But, aside from exceptions and qualifications—and none such is asserted in the present case—the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry."
>
> "*He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. Nelson v. United States*, 201 U. S. 92, 115."
>
> "On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization. * * *"

"And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

"The present cases are not exceptional, and for the reasons that have been outlined we are of opinion that appellants were not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted."

To like effect is the recent case of:

United States vs. Watson, 266 Fed. 736 (D. C. Fla., 1920), where a witness before a grand jury was not permitted to question the constitutionality of the Lever Act authorizing the investigation or the authority of the grand jury to call before it a witness to ascertain any infraction of that Act.

The appellant seeks to distingush the *Blair* and *Watson* cases, *supra,* by pointing out, (B. 40) that he does not attack the constitutionality of the statutes under which Sinclair and Fall were prosecuted, nor the resolutions permitting the prosecutions, nor the grand jury investigations preceding them. The distinction ignores the reasoning of the cases, which is that a witness is not to concern himself with the rights of the parties to the case in which subpoenaed. We do not deny the appellant's right to challenge the constitutionality of those features of the Walsh Act as have directly affected him, but we contend he has no right to question such features as only could affect Sinclair and Fall or that did not operate to appellant's prejudice. Just as in the *Blair* and *Watson* cases, the ap-

pellant lacks the capacity to raise this point because he is attempting to assert an alleged defect that only concerned, as a primary right, the defendants in the criminal trial. The appellant's position is exactly parallel with the situation in the *Jeffrey Manufacturing Company v. Blagg* case, *supra.*

B. THE SIXTH AMENDMENT DOES NOT REQUIRE THAT THE ACCUSED IN THE CRIMINAL PROSECUTION HAVE EQUAL COMPULSORY PROCESS WITH THE PROCESS AVAILABLE TO THE GOVERNMENT.

It is apparent that the Sixth Amendment does not guarantee to those being tried for a crime that they shall have compulsory process for obtaining witnesses *equal* to the process available to the prosecution. It merely guarantees compulsory process, not *equal* compulsory process. Appellant relies upon the case of *In re Dillon,* 7 Fed. Cases No. 3914, p. 710 (7 Sawyer 561) (1854). This was a case in which one Del Valle was on trial for a criminal offense. He had obtained a subpoena *duces tecum* directed to Dillon, a consul of France in California. Dillon failed to respond and the issue was as to whether he could and should be compelled to respond. He relied upon a treaty between the United States and France, exempting consuls from the obligation to appear in court as witnesses. The district judge in deciding the question ruled that the compulsory process guaranteed to the accused did not include the right to process against witnesses constructively beyond the jurisdiction of the court or otherwise exempted from obedience to subpoena. As an *obiter dictum* the district judge said that the Sixth Amendment gives those on trial for crime "rights in all respects similar and equal to those possessed by the Government for establishing his guilt." (p. 712.) This *dictum* does not follow

from the reasoning of the district judge leading up to the statement. That reasoning is (p. 712):

> "It is now in England by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance * * *. *Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendances of his witnesses and the right to have the assistance of counsel, were incorporated into the Constitution.*"

Accepting that statement as to the status of the common law at the time the Constitution was adopted, then upon familiar principles of constitutional law the provision should be interpreted to afford the defendant in a criminal case compulsory process to obtain the witnesses within the common law reach of such process.

The background of the Sixth Amendment is given in *United States v. Reid*, 12 How. 361 (1851), at page 364 of the opinion as follows:

> "But as the law formerly stood, the value of this right was much impaired by the mode of proceeding in criminal cases. For when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.
>
> "It is true that Lord Coke, in his 3 Inst. part 3, 79, declares in strong terms that the rule which prohibited the witnesses for the accused from being examined on oath, was not founded in law. Yet the rule, at the period we speak of, was daily sanctioned and acted on in the English courts. 2 Hale, P. of the Crown, 283,

4 Bl. Com. 355, 358, 359, and was in full force when the English colonies were planted in this country.

"This oppressive mode of proceeding had been abolished in England and the colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practised under it had not passed away. And the thirteen colonies who united in the declaration of independence, as soon as they became States, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen States which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression. And the provisions in the Constitution of the United States in this respect are substantially the same with those which had been previously adopted in the several States. They were overlooked in the Constitution of the United States as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offence against the United States, the same mode of trial, and the same mode of proceeding, *that had been previously established and practised in the courts of the several States.*"

Section 29 of the First Crimes Act of April 30, 1790 (1 Stat. 118) (R. S. Sec. 1034; U. S. C. A., tit. 18, Sec. 563) (referred to in *Re Dillon, supra*) is significant in that it provides that any person indicted for treason or for a capital offense

"shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is *usually* granted

to compel witnesses to appear on the prosecution against them."

Thus, the Congress composed of men lately familiar with the formation of the Constitution only provided for equal process for those accused of treason and capital offenses. Impliedly, they did not consider equal process necessary under the Constitution and were making this provision for equal process in limited classes of cases. Such declaration is significant and persuasive that equal process is not guaranteed by the Sixth Amendment.

There are a number of respects in which a person accused of crime has a lesser right to compulsory process than is accorded to the government:

1. When an indigent criminal defendant is upon trial he is given a limited right to compulsory process for his witnesses at the government's expense. This is provided by U. S. C. A., tit. 28, section 656 (R. S. §878; 9 Stat. 74) as follows:

> "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses that the court in term, or any judge thereof in vacation, may order such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States."

Thus the right to compulsory process on behalf of an indigent defendant is left wholly in the discretion of the trial

court and this discretion has been held not subject to review. *Goldsby v. United States*, 160 U. S. 70 (1895); *Crumpton v. United States*, 138 U. S. 361 (1891); *Dupuis v. United States*, 5 F. 2d 231 (1925).

While on the other hand the right of the District Attorney to compulsory process for securing the attendance of witnesses on behalf of the United States, at the expense of the government, is unlimited. See *United States v. Barefield*, 23 F. 136 (D. C. Tex., 1885) at 137, where the court said:

> "* * * The process of subpoena is always at the command of the United States district attorney, without the authorization of this court, and witnesses, when subpoenaed under his order and discharged by him, are allowed by the court their *per diem* and mileage."

2. Likewise the rights of the government and the defendant are far from being equal when the issuance of a recognizance is involved to insure the attendance of a witness at a trial. See U. S. C. A., Tit. 28, Section 657. (R. S. Section 879; 9 Stat. 73.)

> "Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States, may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And, where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost."

Also see U. S. C. A., Tit. 28, 659 (9 Stat. 73) (R. S. Section 881), which provides that any federal judge, on appli-

cation of the District Attorney; and being satisfied by proof that any person is a competent witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest to give recognizance, and that such person may be confined until removed for the purpose of giving fair testimony or until he gives the recognizance required by said judge. The attorney for a criminal defendant has no such means of insuring the attendance of his witnesses, yet the Supreme Court said in *Barry, Sergeant at Arms, et al. vs. United States ex rel. Cunningham*, 279 U. S. 597 (1929), at 617:

> "The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question."

and at page 618:

> "The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established."

3. "The constitution provides that the defendant shall have compulsory process to obtain the testimony of his own witnesses, but does not guarantee more than ordinary diligence on the part of the officers, or that they shall serve a witness who conceals himself." (*Smith v. State*, 118 Ga. 61; 44 S. E. 817 (1903).)

See also 40 *Cyc.* 2157; *State v. Huff*, 161 Mo. 459, 61 S. W. 900 (1901); *State v. Capola*, 102 Southern 82 (La. 1924). The officers might exercise more than "ordinary diligence" on behalf of government but the fact that they are only required to exercise ordinary diligence in behalf of the accused is not a denial of "compulsory process" and hence *equal* process is not required.

4. The granting of a continuance predicated on the absence of witnesses desired by the accused rests in the

sound discretion of the court not subject to review in the absence of abuse. It is possible that the court would be more liberal in its discretion in behalf of the government. The point is that mathematical equality is not required. 40 *Cyc.* 2157; *State v. Pope,* 78 S. C. 264, 58 S. E. 815 (1906); *Moore v. State,* 59 Fla. 23, 52 So. 971 (1910); *Pittman v. State,* 51 Fla. 94, 41 So. 385 (1906).

5. It is within the discretion of the court whether it will grant a request of an accused for the appearance as a witness of a person confined in jail or state prison. 40 *Cyc.* 2160; *State v. Kennedy,* 20 Ia. 372 (1866); *Ex Parte Marmaduke,* 91 Mo. 228; 4 S. W. 91 (1886). An order for the taking of the depositions of desired witnesses who are in prison sufficiently protects the right of the accused. *People v. Putnam,* 129 Calif. 258; 61 Pac. 961 (1900).

6. The issuance of a subpoena *duces tecum* is in the discretion of the Court. 40 *Cyc.* 2169, paragraph g.

It is said in 40 *Cyc.* at page 2158:

> "The guarantee of compulsory process does not preclude legislative regulation in the matter of procuring the attendance of witnesses by persons accused of crime, so long as the right is not impaired or its reasonable exercise denied, especially where it is proposed to throw the burden of the cost and expense to be incurred therein upon the state or the county."

C. THE ACCUSED IN THE CRIMINAL CASE HAS SUBSTANTIALLY EQUAL PROCESS.

Under Section 1 of the Walsh Act, if a defendant has issued letters rogatory to obtain the testimony of the witness in a foreign country, and such witness does not respond thereto, the defendant may have a subpoena for the witness to appear at the trial upon like conditions and with like result to the witness as is given to the United States by Section 2 of the Act. The United States cannot have letters

rogatory in a criminal case because of the provisions of the Sixth Amendment that the accused is entitled to be confronted with the witnesses against him. That does not prevent the accused from having such letters rogatory. Federal courts have uniformly issued commissions *dedimus potestatem* to take depositions of absent witnesses in criminal cases under Section 866, Revised Statutes of the United States. Such commissions were issued in the cases of *United States v. Wilder*, 14 Fed. 393 (C. C. of Ga. 1882) and *United States v. Cameron*, 15 Fed. 794 (C. C. of Mo. 1883). They were also issued in the case of *United States v. Sinclair and Fall*, No. 43324 in the Supreme Court of the District of Columbia, to obtain the testimony of Fall after there had been an order for the separate trial of Sinclair. This was at the request of counsel for Sinclair. This is the very trial for which the appellant was subpoenaed, that is involved in Contempt No. 18 (R. ~~5139~~ 200): The trial court below stated in passing upon this point (stenographic transcript of proceedings on September 16, 1929, p. 21):

> "* * * we have frequently applications granted for testimony to be taken of witnesses on behalf of the defendant in criminal cases pending here."

Section 1 of the Act does not limit the relief to a defendant of having a subpoena issued upon default of a witness to respond to letters rogatory to civil cases. In terms it applies to such a refusal to answer to letters rogatory issued in any kind of a case. We have shown that such letters may be issued at the request of a defendant in a criminal case. Therefore, the terms of Section 1 include criminal cases.

The appellant refers to the Report of the House Committee on Judiciary, No. 1313, (Sixty-ninth Congress, 1st Session, May 26, 1926), pages 1-3 for his statement that Section 1 of the Walsh Act was intended by Congress to

apply to civil cases only, and that "the Honorable Atlee Pomerene advocated the inclusion of Section 2 of the Act because it was desired to secure testimony in criminal cases." (RB. 43.) We do not deny that government counsel requested the inclusion of Section 2 so that the government could procure such testimony in criminal cases. But it does not follow that Section 1, as the Act was finally passed, was intended to apply to civil cases only. As aforesaid, the government could only take advantage of it in civil cases, but it was available to the accused in criminal cases. Even if the interpretation of the Report by the appellant were correct, such an erroneous opinion concerning the effect of a law, expressed by a committee of Congress, does not alter the law.

Knickerbocker v. Stewart, 253 U. S. 149, (1920);
United States v. Lindsly, 7 F. 2d, 247, (D.D. La. 1925).

Then the appellant argues that letters rogatory depend upon comity; that we do not extend the right of letters rogatory except in suits for the recovery of money or property and that therefore a foreign country would not recognize our letters rogatory in criminal cases. (RB. 43-44.) The answer is obvious that the foreign country might recognize the letters, even if we would not recognize similar letters. The foreign country might waive its insistence upon reciprocity, but if it did not permit the use of letters rogatory then the spirit of Section 1 would have been satisfied so that the court could subpoena the desired witness at the instance of the accused.

The further argument of the appellant that letters rogatory are not compulsory process because the foreign country can not be compelled to execute them does not meet our answer that if the letters are recognized and executed, the accused has substantially equal process, and if they are

not so recognized, compulsory process for the witness abroad is available. The interposition of a preliminary requirement in the case of the accused, is not a final deprivation of compulsory process and is not so harsh as to make compulsory process in the case of indigent prisoners dependent upon the discretion of the court.

Since the defendant in a criminal case has the right to letters rogatory and to a subpoena for a recusing witness, he has substantially equal process to that accorded the United States. Undoubtedly had it not been for the Sixth Amendment the Act would have required default upon letters rogatory before authorizing the United States to subpoena a witness from abroad. The distinction in procedure is, therefore, a reasonable one.

The contention of the appellant under this point is analogous to a contention which has been made that a defendant in a criminal case is denied due process and the equal protection of the laws if he is not accorded equal rights of appeal to those accorded the prosecution. Nevertheless, it has been held by the Supreme Court of the United States that giving the United States the right of appeal where none is given to the defendant is not a denial of due process or equal protection of the law.

United States vs. Heinze, 218 U. S., 532 (1910).

The United States Circuit Court for the Southern District of New York sustained a demurrer to fifteen (15) counts out of sixteen (16) counts in an indictment charging Heinze with the misapplication of funds of a National Bank in violation of Section 5209, Revised Statutes. The government appealed to the Supreme Court under the act of March 2, 1907. That act conferred upon the United States alone the right to have the Supreme Court review a decision involving the construction of federal laws; and denied such right of review to defendants in every form

and at every stage of the case, except in cases involving a capital crime. It is said in the opinion of the court by Mr. Justice McKenna (pp. 545-6):

> *"It is contended by the defendant that the act of March 2, 1907, is not applicable to the case, because the right it offers is 'wholly unilateral.' 'It opens the door of this court,' it is said, 'to the United States as one party to the cause only, and denies the same privilege to the defendant.' The ultimate contention is that defendant is thereby denied the equal protection of the laws. This inequality is asserted because the United States is given an appeal to this court, and before trial, and a defendant is only given right of review in the Circuit Court of Appeals, and only at the end of the trial. The defendant is put to expense and peril, it is urged, though the indictment against him may be wholly bad, 'and is at every stage of the case forbidden the right of review upon any question in the Supreme Court, except the construction or application of the Constitution or the constitutionality of any Federal statute.' And this, it is insisted, is the denial of due process of the law as well as the denial of the equal protection of the laws. We shall not follow the somewhat roundabout argument to establish the identity of those two rights. If we should yield to the argument it would necessarily follow that if defendant has not been denied due process he has not been denied the equal protection of the law, and this court has decided that the right of appeal is not essential to due process of law. Reetz v. Michigan,* 188 U. S. 505, 508. *The provisions have definite application, and even if the explicit clause of the Fourteenth Amendment, forbidding a State to deny to any person within its jurisdiction the equal protection of its laws, can be said to apply to the United States, it can have no broader meaning when so applied than when applied to the States. Assuming, therefore, and assuming only, not deciding (see District of Columbia v. Brooke,* 214 U. S. 138, 149) *that Congress may not discriminate in its legislation, it certainly has the power of classifi-*

cation, and the act of March 2 is well within such power.''

The appellant seeks to avoid the application of the principle stated in the *Heinze* case, *supra*, with the argument that the Constitution does not guarantee an accused a compulsory right to review. However, it does guarantee the accused due process, and the distinction of the appellant would only be meritorious if the Sixth Amendment included the word ''equal'' before ''compulsory process.''

IX. THE WALSH ACT IS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE, AND DOES NOT DENY DUE PROCESS. (ANSWERING APPELLANT'S POINT G.)

The appellant argues, (B. 40-41; RB. 44-45), that the Walsh Act is unreasonable in—

(1) making ''ownership of 'non-offending' property a condition precedent to judgment of guilt of crime''; (2), punishment will only be possible against property owners, —the rich and not the poor; (3) that property will be attached while the presumption of innocence prevails and before proof of guilt.

The first contention is so pregnant with errors that it scarcely needs notice.

First, the charge is not of a criminal offense. We will not repeat the arguments or again refer to the authorities as to that. Second, ownership of property is not a condition precedent to judgment.

We will not repeat our analysis of the Act. It is sufficient merely to call attention to the fact that if the defaulting witness returns to this country or can be personally served abroad, his guilt may be determined. What we

have already said disposes of the second contention that punishment is only possible against the rich—the property owner—and not the poor, but, in addition, it is apparent that the property owner requires the protection of the United States not only of his person abroad, which would be accorded to the poor, but also of his property in this country. It is not unreasonable to classify those who require the protection of our government for their property differently from those who have no property requiring our protection.

As to the second contention:—We are utterly unable to see any unfairness in the attachment of "non-offending" property while the presumption of innocence prevails. As well could it be argued that state statutes, providing for jurisdiction by "foreign attachment," are unreasonable in drawing a distinction between the rich and poor, property owners and non-property owners, and as involving seizure of property before adjudication of the validity of the plaintiff's claim. In such cases "non-offending" property is held while the plaintiff is under the burden of proving the obligation and duty of the defendant property owner,—one might say while the presumption of innocence prevails. (Cf., *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 272, 277, 280, (1855)).

Even if the Act only provides punishment for the wealthy, there is no reason to allow a guilty rich man to escape just because a guilty poor man can not be punished. The rich are more likely to be able to go and stay abroad than the poor, and it is common sense, in view of human nature and the ordinary course of business and dealings, that the rich are more likely to want to place themselves in a position to avoid the necessity of testifying. The classification is not unreasonable.

It will be remembered that at common law, England could and did exercise the right of taking all the property of such an offending subject. The appellant argues that to do so savors of outlawry, and violates the rudimentary conceptions of the fundamental rights of the citizen. We deny that it is a fundamental right of a citizen to have his property and person protected by his government while he deliberately refuses to perform his obligations of allegiance to the country. Cases have very recently been before this Court in which citizenship was denied to applicants who refused to take oath to bear arms in case called upon by the government to which they sought to belong. The policy back of those decisions and the legislation upon which it is based, is as if the Congress had declared in the Walsh Act that all the property of the disobedient citizen should be confiscated by the government. The appellant deliberately put himself in a position where he forfeited some of his "fundamental rights as a citizen" (not guaranteed by the Constitution) and thereby subjected himself to the penalties of the Walsh Act just as certainly as the applicants for naturalization forfeited their right to secure such fundamental privileges of citizenship. As Mr. Justice Van Devanter said in the *Luria* case, *supra*, "membership in a political society involves its obligations as well as its rights." The appellant has been accorded all the rights guaranteed by the Constitution, and his attempt to go back of that to the "fundamental rights of the citizen" comes with poor grace from one who has flouted the government to which he owes allegiance. These remarks go to the abstract attack upon the unreasonableness of the Act, for it seeks to reach all who behave as the appellant acted.

(ANSWERING APPELLANT'S PROCEDURAL POINTS.)

Introductory Statement.

The appellant's point "H" embraces five procedural points based upon the assumed validity of the Walsh Act, but upon allegations that the procedure followed does not comply with due process under the Fifth Amendment. These points have required the appellant to admit that he went further in his statement to the trial court, quoted, *supra*, page 3, than he intended. He then stated—

> "The proceedings here in question, however, were all taken in exact pursuance of an Act of Congress, * * *.
>
> "The question thus reduces itself to a consideration of the constitutionality of this legislation."

While that statement was made with reference to Case No. 200 in this Court, the procedure in Case No. 201 was substantially the same.

If the judgments in these cases were reversed, upon appellant's procedural points "a" and "b", he would go free, and if the judgment in Case No. 201 in this Court were reversed upon the ground stated in appellant's procedural point "e", he would go free in that case. But if the judgments were reversed upon his procedural points "c" and "d", it would only lead to new proceedings. Nevertheless, we will preserve the order of discussion adopted by the appellant.

X. THE SHOWING UPON THE REQUESTS FOR SUBPOENAS WAS SUFFICIENT AND THE COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THEM. (ANSWERING APPELLANT'S POINT H-a.)

The appellant argues that the subpoenas in both cases were issued without any "showing" justifying the action of the court, for the reason that the petitions for the subpoenas, signed by the two special counsel and the district attorney and verified by one of the special counsel, disclosed only a "belief" that the appellant could give the desired testimony. (B. 41, 42; RB. 45, 47.)

It is hard to understand how government counsel could ever "show" the court more than their "belief"; especially when the desired witness left the country upon the approach of clouds of danger that he might be required to testify, and had actually refused on letters rogatory issued in a previous civil case, to give more than his name. (R. 200, p. 81; R. 201, p. 74.)

We submit that the representation of government counsel of the "belief" that the appellant could give testimony as to the facts stated in the applications for the subpoenas, was a "showing" of a fact, to wit: the state of mind of government counsel, upon which the court, in its discretion, could rely or could call for a further showing. While we believe the showing made in the written petitions for the subpoenas was ample to satisfy the requirements of the statute, there is nothing in the record to indicate but that the court may have inquired further and orally of counsel concerning the foundation for their belief.

A mere statement of government counsel is sufficient for a subpoena *duces tecum*. *United States v. Terminal R. Ass'n.*, 148 F. 486, 489 (C. C. Mo., 1906). An affidavit for service by publication upon information and belief only

is sufficient. *Thompson v. Thompson*, 226 U. S. 551, 565 (1913); *Kretzschmar v. Rosasco*, 250 Mich. 9, 229 N. W. 446 (1930).

Clearly there was not such an abuse of discretion by the court in relying upon the belief of counsel for the government as would justify an appellate court in reversing the cases. In truth, the exercise of such a discretionary power by the trial court is not reviewable in the absence of clear proof of an abuse of discretion. The appellant has offered no proof whatever that the belief of government counsel was not well founded, or that he could not have testified upon the subject matters mentioned in the petitions for the subpoenas.

We have already called the attention of the Court to the law that the discretion of the trial court in determining whether and how many subpoenas to issue at the request of an indigent prisoner, is not reviewable. *Goldsby v. United States*, 160 U. S. 70 (1895), and other cases cited, *supra*, page 144. The issuance of a subpoena *duces tecum* is discretionary with the trial court, and the opposite party is not entitled to notice of the application for such a subpoena or to contest the discretion of the court in granting it. (40 *Cyc.*, p. 2169, paragraph g.) Surely, the appellant does not contend that he was entitled to notice of the application to subpoena him so that he could prepare himself to dodge service.

Finally, the appellant, or any witness so subpoenaed, should not be permitted to raise the question of the showing for the issuance of the subpoena.

One who fails to obey a subpoena, order to show cause or other order of court valid on its face and issued pursuant to jurisdiction of the court of the parties and subject matter can not question the sufficiency or regularity of the pro-

ceedings leading up thereto, or the form or sufficiency of the showing for the issuance of the subpoena or order.

Brougham v. Oceanic Co., 205 Fed. 857, (C. C. A. 2nd Cir., 1913);
People v. Sturtevant, 9 N. Y. 263, (1853);
Harris v. Clark, 10 How. Pr. (N. Y.) 415, (1854);
Day v. Bergen, 53 N. Y. 404, (1873);
Silliman v. Whitmer, 173 Pa. St. 401, (1896);
Burtch v. Zeuch, 200 Iowa 49, 202 N. W. 542, (1925);
Jenkins v. State, 59 Neb. 68, 80 N. W. 268, (1899);
State v. Nathans, 49 S. C. 199, 27 S. E. 52, (1896);
Carlson v. State, 234 U. S. 103, (1914);
Blair v. United States, 250 U. S. 273, (1919).

The appellant cites 36 *Cyc.* 434, (B. 42). Among the definitions of "show" given at that citation are the following:

> "As a verb—to exhibit or present to view; to cause to see; * * * to give the reason and explanation of; to manifest; to evince; * * *. Sometimes used as synonymous with represent."

Beyond doubt, the petitions for the subpoenas gave the reason and explanation of the applications and contained a representation by counsel for the government, sufficient to present to view and cause the court to see the reasons the appellant was wanted as a witness.

The appellant also cites *Hanford v. Duchastel*, 93 Atl. 586, (N. J., 1915).

In that case an affidavit for writ of attachment was held insufficient in that it did not set forth a cause of action. The statute required proof of a cause of action and the nature and particulars thereof, and it is said in the opinion:

> "And this, of course, means proof of facts sufficient to establish such particulars and not mere belief or conclusions of the witness."

The Walsh Act does not require government counsel to outline the testimony of the desired witness, but only to make such a showing as will, in the discretion of the court, justify a subpoena.

Apart from all questions of legal right, a witness subpoenaed, as the appellant was subpoenaed, if he believes he can give no testimony of any relevancy to the cause in which subpoenaed, or if any reason exists why he can not attend as required, should not, upon principles of fair dealing, wait until called in the trial to attack the showing for the subpoena or present his excuses. If he took the matter up immediately, no doubt the court and government counsel would be glad to consider any excuses he might have for not attending, and if it were made clear that he could give no helpful testimony, he might be released, or if it became apparent that he could give helpful testimony, the criminal case might be continued until he could more conveniently attend. To permit a witness to sit quietly back until he can no longer fulfill his duty and then attack the showing for the issuance of the subpoenas, is not only unjustifiable in law, but is contrary to good morals and fair dealing.

Dickinson v. Huntington, 185 F. 703 (C. C. A. W. Va. 1911);

Selmer v. Smith, 285 Pa. 67; 131 A. 663 (1926);

Hunter v. May, 161 Tenn. 155; 25 S. W. (2nd) 580 (1930).

XI. IT WAS NOT NECESSARY THAT THE SUBPOENAS CONTAIN NOTICE THAT THEY WERE ISSUED UNDER THE WALSH ACT. (ANSWERING APPELLANT'S POINT H-b.)

The appellant argues (B. 42-45; RB. 47-48) that the subpoenas served upon him were invalid because there was no notation on them that they were issued under the Walsh Act. This is a specific application of one of his contentions under his point "C." In answering the appellant's point "C," we have shown that neither the Walsh Act nor due process of law requires a subpoena to bear notice of the authority under which issued. We will not repeat the argument. (See *supra*, pages 126-127.)

Presumably the subpoena intended by the Walsh Act is the ordinary, customary and usual subpoena of the court. That is the form that was used in these cases.

Appellant was in a better position than the ordinary citizen who is constructively charged with notice and knowledge of the statutes and laws of the land. His attorney, Mr. Battle, advised with him in the summer of 1927, upon the question of the constitutionality of the Walsh Act, the Act of July 3, 1926. (R. ~~5131~~ 200, p. 77; R. ~~5132~~ 201, p. 70.) Appellant knew the provisions of the Act and that he might be punished under it if he failed to respond to the subpoenas. (R. ~~5131~~ 200, p. 81; R. ~~5132~~ 201, p. 75.) That was after service of the first subpoenas and before he was required to appear before the court, for the first subpoenas required him to appear on October 17, 1927. He was not only chargeable with knowledge that the subpoenas were authorized and issued under the Act, but he had actual knowledge of the fact.

XII. APPELLANT RECEIVED SUFFICIENT NOTICE OF THE OFFENSE CHARGED IN EACH CASE TO CONSTITUTE DUE PROCESS. (ANSWERING APPELLANT'S POINT H-c.)

In the appellant's brief, at page 44, it is said—

> "It should be understood that we are not contending as to the 'form' of notice. We protest the total lack of notice in any form."

Then the appellant re-injects the questions of the validity of an extra-territorially served subpoena or notice, and the validity of a subpoena that does not bear a notation of the statutory authority under which issued, and finally argues that he had refused to obey so many subpoenas that he did not know which were involved in these two cases. (RB. 49.)

We will not recur to the argument upon the alleged lack of notice on account of it being extra-territorially served, or to the validity of the subpoenas on account of having no reference to the statutory authority under which issued.

In Case No. 200, the order to show cause served upon the appellant personally and also published, advised him that a "petition" had been "filed" by "special counsel for the United States of America," pursuant to which the court was therein ordering the appellant to appear before it on a specified day at a specified time to show cause why he should not be adjudged guilty of contempt and be punished accordingly, and went on to direct further procedure "in accordance with the provisions of Section 6, c. 762 of the Act approved July 3, 1926, 44 Stat. 835." (R. 200, pp. 11-12.)

In case No. 201, the alias order to show cause, which was personally served upon the appellant and also published, advised him that "upon motion of the United States of America" the appellant is ordered to appear on

a certain day at a certain time and show cause, if any he has, why he should not be adjudged guilty of contempt in failing to appear as a witness in the Sinclair-Fall case, "the circumstances of which are very fully set out in said motion of plaintiff filed herein," and directed further procedure, which, without expressly referring to the Walsh Act, so closely follows the form of the order in Case No. 200, that the appellant could not help but know that the order was under that Act. (R. 201, pp. 11-12.)

In 49 *Corpus Juris*, p. 652 in Section 922, it is said:

> "With some qualifications the general rule is that only when required by statute is service of copies of the pleadings on the other party or on co-plaintiffs or co-defendants necessary, although such service where unnecessary is proper and within the privilege of a party to make."

Thus, in both cases, the appellant was advised that a written petition or motion had been "filed." If he were in any doubt as to what had given rise to the charges against him in each case, such filed papers, if examined by him, would dispel all doubt. (R. 200, pp. 4-11; R. 201, pp. 5-9.)

In 49 *Corpus Juris*, p. 651 in Section 919, it is said:

> "*While all the parties to an action are bound to take notice of pleadings properly filed* within the time required by law, unless actual notice is required by statute or rule of court, yet where a party against whom judgment has been entered obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, * * *."

We submit that the orders to show cause gave the appellant notice of all elements of the offense charged as fully as an ordinary summons in an action at law. If the orders to show cause in the cases at bar are compared with the summons sustained in *Eddy v. Lafayette*, 163 U. S.

456, 457, 464, 465 (1896), we believe the information contained in said orders to show cause is even more complete than the information contained in the summons sustained in said case. (Cf. *Ammons v. Brunswick etc. Co.*, 141 F. 570 (8 C. C. A. 1905); *Gulf etc. Ry. Co. v. James*, 48 F. 148 (1891); *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754 (1886); *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323 (1904); *Flanery v. Kusha*, 143 Minn. 308; 173 N. W. 652 (1919).)

The immemorial forms of bench warrant and of capias are no more definite than were the orders to show cause in the cases at bar. The practice is that after the arrest, the prisoner or his attorney must inquire for the indictment. The only exceptions are by virtue of the statute which requires a copy of the indictment to be served on the accused three days in advance of trial for treason and, two days in advance of trial for other capital offenses. (U. S. C. A., tit. 18, Sec. 562; R. S. Sec. 1033; 1 Stat. 118.) Neither the Walsh Act nor any other statute, nor any constitutional provision required that the petition containing the details be served upon the appellant.

If, after an examination of the indictment, the accused is still uncertain as to the charge, he may satisfy himself through an application for a bill of particulars.

In addition to the cases previously cited herein, we will at this time refer to only one more:

Bowles v. United States, 50 F. 2nd 848 (4th C. C. A., 1931):

Bowles was adjudged in contempt of court for appearing as an attorney in good standing at the bar of the District of Columbia, whereas he had been disbarred there. He was accorded a hearing by the district judge, but offered no testimony to explain his conduct. He had asked for a bill of particulars and for a jury trial, which the Court declined to order. It is said in the opinion, page 852:

"As to the bill of particulars, the granting of this was a matter resting in the sound discretion of the trial court; and there is nothing to show that the discretion was abused. On the contrary, it is difficult to see how the charges could have been made more specific. Respondent was apprised of the date, time, place, and nature of the acts complained of; *and it is inconceivable that, with all that had taken place in the case, he was not fully advised of all of the circumstances of the charge against him.*"

Counsel for the appellant do not deny receipt, as a matter of courtesy from the solicitors for the government, of copies of the petition and of other papers filed in these cases leading up to and subsequent to the orders to show cause. Since no provision of law requires the service of such papers personally upon the accused, he has, through his counsel, received all necessary actual notice. In addition to the cases previously cited to the effect that no fixed form of complaint is necessary in contempt cases, we will here only refer to *Gompers, In re:* 40 App. D. C. 293, 326, 327, 328 (1913) and *Hunter v. United States,* 48 App. D. C. 19, 23-26 (1918).

Counsel for the appellant received copies of all pleadings. The appellant, through their agency, received such notice as a matter of law, unless the counsel of record are not in fact attorneys for the appellant,—a conclusion which we do not even intimate, and which would be contrary to the submission of the appellant in each case of his affidavit of citizenship. The appellant could not have caused his attorneys to appear specially for him to file all the various motions and pleas denying in detail the allegations of the petitions for the orders to show cause, without necessarily knowing the charges he was denying. The appellant could not present the testimony of his counsel in mitigation, unless he knew what offense he was attempting to mitigate. We do not contend that such submission of evidence as to

the merits of the case, waived the objections and exceptions of the appellant to the jurisdiction of the court, raised in his points "A" and "B." And hence we do not dispute the applicability of the decision of this Court in *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522 (1931, preliminary print). But we do not understand that case to hold that a defendant can present testimony on the merits of the case against him and at the same time claim that he had no actual notice (questions of jurisdiction, and form and place of service not being involved in this point) of the charges and no opportunity to present defenses and explanations.

So, when the appellant says—

"We protest the total lack of notice in any form"

the appellant can only mean to again raise legal questions which have already been discussed.

XIII. THERE WAS NO ABANDONMENT OF THE LEVY AND SEIZURE IN CASE NO. 200 BY THE LEVY AND SEIZURE IN CASE NO. 201. (ANSWERING APPELLANT'S POINT H-d.)

The appellant argues, (B. 44-45; RB. 50-51) that since the marshal levied upon and seized the same bonds in case No. 201 of which he had custody in case No. 200, that thereby the government abandoned the seizure in case No. 200.

The abandonment of a levy is a matter of intention. *Stillman v. Hamer*, 70 Kans. 469, 78 Pac. 836 (1904); *Gordon v. Jenney*, 16 Mass. 465 (1820). Among the innumerable cases holding that property *in custodia legis* may be attached, we will only cite one: *Halpin v. Hall*, 42 Wis. 176 (1877).

In some jurisdictions when an *alias* or *pluries* writ of attachment is issued in the same proceeding as the original

writ of attachment, a presumption of law is raised of intention to abandon the original levy. The authorities cited by the appellant, (B. 45) relate to such jurisdictions and to such procedure. In other jurisdictions, the subsequent levies are mere evidence of the necessary intent to abandon. (*Freeman on Executions*, p. 1524.)

The procedure in the cases at bar was entirely different, and, as the court below said, (R. 200, p. 103):

> "* * * Here, there were two different seizures in two different cases upon two different causes of action. The two different levies in these cases are not inconsistent with an intent on the part of the government to maintain each."

Furthermore, even if the appellant were correct, which he is not, the discharge of the attachment in case No. 200 would not invalidate the proceedings and judgment because the appellant was personally served with the order to show cause. The court thereby acquired personal jurisdiction of the appellant and it is not necessary to rely upon the *quasi in rem* procedure.

XIV. THAT APPELLANT WAS NOT CALLED UNTIL APRIL 9, 1928, DID NOT EXONERATE HIM IN CASE NO. 201. (ANSWERING APPELLANT'S POINT H-e.)

Case No. 201 involves the subpoena to appear on April 2, 1928 "and not to depart the court without leave of the Court or district attorney." (R. 201, p. 8.) It is alleged in the petition for the order to show cause in case No. 201, that at the time the subpoena involved in that case was issued, the re-trial of the Sinclair-Fall case was set for April 2, 1928, and

> "7. That the trial of said case was continued by the court to Monday, April 9, 1928." (R. 201, p. 7.)

These allegations are admitted in pleas of the appellant. (R. 201, p. 26.) But the appellant goes on to allege in his pleas and to argue in his briefs, (B. 45-46; RB. 51-52) that he received no notice of the continuance of the trial; that there were no proceedings in the case on April 2, 1928; that he could not have testified on said date, and that he was not called as a witness on said date. (R. 201, p. 26.)

Appellant does not allege that he appeared at court on April 2, 1928, and admits that he was called after the trial commenced on April 9, 1928, and did not respond. (R. 201, pp. 26, 27.)

The evidence is uncontradicted that after the Sinclair-Fall case was set for re-trial on April 2, 1928, the government made a motion on March 22, 1928, for a severance and that the defendants in that case objected that they would need time, if the motion were granted, to take the deposition of Mr. Fall. Accordingly, the court granted the motion and extended the time for the commencement of the trial to April 4, 1928 to accommodate the defendants. Later an exigency arose which necessitated postponement to April 9.

The appellant seeks a strict construction of the Walsh Act as not authorizing a subpoena including the term "not to depart the court without leave of the court or district attorney" and as permitting only a subpoena for a particular day and time. (B. 46.) We suppose that the appellant contends that if he were not called at 10:00 o'clock, sharp, Eastern Standard Time, on April 2, 1928, that he should be freed. We assume that appellant would argue that if the trial had commenced on April 2, 1928, and that day had been taken up with the impaneling of the jury, and the succeeding day with the opening statements of counsel and several succeeding days with the introduction of evi-

dence necessary to make the testimony of the appellant competent, that he would have been under no obligation to respond when finally called as a witness. There surely is no such intention apparent in the Walsh Act. The Act does not require counsel for the government or the court to foresee the exact day that the witness will be called, or to name any particular number of days upon which he shall appear. The Act contemplates the ordinary form of subpoena and the ordinary duties of a witness under such a subpoena.

Section 877 of the Revised Statutes (U. S. C. A., Title 28, Section 655) provides:

> "Witnesses who are required to attend any term of a district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf and not to depart the court without leave thereof, or of the district attorney."

There is nothing in the Act of July 3, 1926, inconsistent with the applicability of that statute. It is too well known to require the citation of authority that acts of unlimited scope, such as R. S. Sec. 877, *supra*, are enforced in every respect not inconsistent with acts of limited applicability, such as the Act of July 3, 1926. The two are construed together and each is given effect except insofar as they are necessarily inconsistent with each other. Thus, it was perfectly proper for the subpoena served on the appellant to provide that he should not depart without permission.

The appellant cites no cases in his briefs here, but in the Court of Appeals he cited cases in which the subpoena directed appearance on a legal holiday or a time that was past when the subpoena was served, or in which there was evidence of an intention to abandon the subpoena or in which there was no warning that the witness should not depart until excused. Such cases are upon an entirely dif-

ferent set of facts than those appearing in these cases. The difference in facts plainly discloses the difference in the principles of law applicable.

In the case of *Munroe v. United States*, 216 Fed., 107 (C. C. A. 1st Cir. 1914), cited by the appellant to the Court of Appeals it is important to notice that the witness had responded to the subpoena *duces tecum* by personally appearing and stating that the documents subpoenaed were not within his control. There is nothing to indicate that he would have been justified in refusing to appear personally, merely because the documents requested were not within his power to produce. The appellant in these cases has not undertaken in any way to show that he was physically unable to comply with the subpoena of court.

In *Leber v. United States*, 170 Fed. 881 (C. C. A. 9th Cir. 1909), the original subpoena required the witness to attend at 11 A. M., while the copy left with the witness said to attend at 10 A. M. The witness did not appear at either time because he claimed the subpoena was void. It was, therefore, held that the difference in time was no defense.

The service of the subpoena was notice of the command of the court. The appellant was commanded to be in court on April 2, 1928, and "not depart the court without leave of the court or district attorney." The appellant did not obey the command. And even apart from the warning contained in the command that the appellant should not depart until excused, the law is well settled that a witness is required to attend court from time to time and term to term until the case is tried or until he is properly excused.

Brady v. State, 120 Ga., 181; 47 S. E. 535 (1904);
State v. Fairfax, 107 La., 624; 31 So. 1011 (1902);
Mattocks v. Wheaton, 10 Vt., 493 (1838);
Commonwealth v. Smith, 4 Pa. Co. Ct. Rep. 321 (1887).

We also cite 40 *Cyc.* pages 2177-8 and page 2189, paragraph iv.

XV. CONCLUSION.

In the reply brief of the appellant, page 5, it is said that the bar and the public have not clamored for the right to reach into foreign countries for witnesses during the approximately one hundred and forty years of our Republic. The statement was undoubtedly made without knowledge of the history given in 43 Harvard Law Review 121 at pages 122-125, Notes 3-14, of the effort to secure the testimony of witnesses who have gone abroad. But even if there had been no such widespread demand for a way of compelling the testimony of our citizens who have gone abroad the courts would not concern themselves in determining the constitutionality of an Act of Congress with the motives of the Congress or the propriety, justness, wisdom or public policy involved in the legislation. Every possible presumption in favor of the constitutionality of the legislation as embodying the will of the people will be indulged and the act sustained unless plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. If fairly possible the legislation will be construed so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score.

The United States owes a duty of protection to its citizens and its citizens owe a duty of allegiance to their country no matter in what part of the world they may be. The Constitution empowers the Congress to pass legislation making such privileges and such duties effective. Among its powers in that connection is a power to recall a citizen of the United States and to delegate the recall, for purposes appropriate to the judicial functions, to the courts.

International law recognizes the right of an independent and equal nation to recall its citizens and the order,

command or notice of the recall is recognized as being inoffensive to the foreign sovereignty where the citizen may be and it is recognized as not being in violation of any right of asylum of the citizen. The manner of conveying the order, command or notice of recall provided in the Walsh Act involves no breach of the peace or reflection upon the independence, equality, integrity or dignity of the foreign countries and is a method to which nations have tacitly consented as recognized in international law.

By virtue of the Walsh Act, properly extended to affect citizens of the United States beyond its territorial limits, and by virtue of the duty of allegiance of the appellant, his inherent consent to be bound by such laws, the issuance of the subpoenas for him involved in the cases at bar created a valid obligation upon his part to return and give testimony. He received such notice of the command that it is not contrary to natural justice or due process to hold him responsible for his default.

Even if the service of a subpoena and an order to show cause upon a citizen of the United States in France were contrary to international law, which it is not, or were contrary to the laws of France, which the appellant has not made to appear, the Act of Congress would nevertheless prevail and not be unconstitutional. Unless contrary to some prohibition of the Constitution the Acts of Congress are the supreme laws of the land and supersede international law. Since Congress has the extra territorial jurisdiction to provide for the recall of citizens and since, as a matter of fact, the means adopted for the recall correspond with natural justice and due process and violate no other right of the appellant guaranteed by the Constitution, neither international law nor the laws of France can render such legislation invalid or unconstitutional.

The Walsh Act provides for enforcement either pursuant to personal service upon the defaulting witnesses abroad or at home or through *quasi in rem* procedure. The purely *in personam* method of acquiring jurisdiction to proceed is constitutional for the reason aforesaid. The *quasi in rem* procedure is constitutional for the reason that the enforcement of any judgment will not exceed execution upon property of the witness previously seized. The quality of the notice accorded in following the *quasi in rem* procedure of the Walsh Act satisfies due process. Modifying the *sui generis* nature and procedure ordinarily surrounding "criminal contempt" proceedings as in the Walsh Act is declaratory and regulatory. It leaves the offense penal and does not make it a crime. It leaves the forms and methods to be followed *sui generis* in so far as not modified.

The Walsh Act provides for all notice of the offense and opportunity to be heard in defense necessary to satisfy due process. The order to show cause will identify the court, place, and time for the hearing and the nature of the charge. If anything more were necessary it is implied that the order will contain such additional information. It was unnecessary for Congress to go into greater detail as to the contents of the order to show cause.

In authorizing the seizure of property the Congress cannot be charged with contemplating an unreasonable search and seizure. It is implied in the Walsh Act that the procedure to be followed in making the seizure shall not violate the Fourth Amendment.

The offense of "criminal contempt" not being a crime "within the Sixth Amendment or common understanding" and the defaulting witness being given an opportunity to be present at the hearing and when judgment is pronounced it is unnecessary to enforce his actual physical presence.

The Sixth Amendment does not guarantee *equal* process to one on trial for a crime with the process available to the government. The Walsh Act accords the accused substantially equal process. Appellant and other witnesses who may be subpoenaed under the Act are not affected by the feature of the Act relative to the rights to subpoena witnesses from abroad that are vested in the government or by the absence of such rights in the accused, if they were absent, and therefore cannot question the constitutionality of the Walsh Act upon the ground of alleged denial of equal process to those accused of crime.

The poor as well as the rich, the non-property owner as well as the property owner may be punished under the Walsh Act, but if that were not true the classification of property owners as against non-property owners would be within the discretion of the Congress. Attachment of property prior to proof of guilt for contempt is not unreasonable. The Act is not arbitrary or capricious and the judgment of the Congress in that respect should prevail.

The procedure which was followed in the cases at bar substantially, if not literally, complied with all the express and implied requirements of the Walsh Act.

The showing upon which the subpoenas were issued was sufficient to justify the discretion of the court, which is not reviewable, even if the appellant were in a position to challenge the sufficiency of the showing, which he is not.

There was no need for the Walsh Act to require any special form of subpoena or that the ordinary form bear a notation of the statute authorizing service abroad. As a matter of fact the appellant knew under what statute he had been subpoenaed.

The orders to show cause which were personally served upon the appellant, and also published, gave him all the

notice necessary to due process. There was no need for the written petition and motion leading up to the orders to show cause and containing the details to be served with the order to show cause. Such pleadings having been filed, the appellant was charged with knowledge of their contents. His counsel had actual knowledge of their contents. If the orders to show cause had been defective in substance it was the appellant's privilege to apply for a bill of particulars.

> "* * * it is inconceivable that, with all that had taken place in the case, he was not fully advised of all the circumstances of the charge against him." (*supra*, page 163.)

There having been two different causes of action, the fact that in the second cause the same bonds were seized as had been seized in the first case raises no presumption of an intention of the government to abandon the seizure in the first case under the circumstances of the prosecution of both cases.

The fact that the appellant was not called until April 9, 1928, in case No. 201, although subpoenaed to appear on April 2, 1928, and although there were no proceedings on April 2, 1928, the case having been continued by order of the court to April 9, 1928, did not excuse the appellant, for he was commanded "not to depart the court without leave of the court or district attorney." Such form of subpoena, complying with R. S. Section 877 (U. S. C. A. Title 28, Sec. 655), is not inconsistent with the Walsh Act. The appellant did not appear on April 2, 1928 and cannot excuse himself upon the ground that there were no proceedings on that date for he was given no leave, either by the court or the district attorney, to depart or excusing him from appearing on the date to which the trial was continued.

It is respectfully submitted that the judgments in both cases should be affirmed.

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